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MICHAEL RODAK, JR.

MISC. NO. 73-1003

In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL INDIAN YOUTH COUNCIL, INTER-MOUNTAIN INDIAN SCHOOL CHAPTER, an unincorporated association, TEDDY K. AUSTIN, MARGARET DE JOLIE, LEE LUKE BEGAY, and ELSIE JIMMIE,

Plaintiffs-Petitioners,

-vs-

LOUIS R. BRUCE, JAMES HAWKINS, STANLEY SPEAKS, BARBARA EARL, SHERMAN L. NAY, MRS. WAMOTH TANNER, DIXON SMITH, E.A. LEOPARDI, JERRY JAEGER, JOHN CROW, WILMA VICTOR, and ROGERS C.B. MORTON,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Richard L. Young, Raymond Ickes
NATIVE AMERICAN LEGAL DEFENSE & EDUCATION FUND, INC.
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Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered September 26, 1973, affirming the dismissal of their Amended Complaint by the United States District Court for the District of Utah, Northern Division.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit has been officially reported at 485 F.2d 97 (1973). A true and correct copy of that opinion is attached hereto as Appendix A. The opinion of the United States District Court for the District of Utah, Northern Division, is officially reported at 366 F. Supp. 313 (1973), and is attached hereto as Appendix B.

JURISDICTION

The judgment sought to be reviewed was made and entered by the Tenth Circuit on September 26, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. S 1254 (1), authorizing review of any civil judgment by writ of certiorari, within 90 days after entry thereof, 28 U.S.C. S 2101 (e).

QUESTIONS PRESENTED

1. Is the Tenth Circuit's decision—that the doctrine of sovereign immunity completely bars any legal or equitable relief against defendant federal officials—inconsistent with applicable decisions of this Court, where the defendants clearly acted beyond and contrary to their statutory authority and in an unconstitutional manner?

2. Is the Tenth Circuit's decision—that plaintiffs' Amemded Complaint was properly dismissed because it presented only non-justiciable political questions—inconsistent with applicable decisions of this Court, where the plaintiff Indian students make no complaint relating to

the political process but seek only to stop the defendant school officials from continuing to violate certain federal regulatory, statutory, treaty, and constitutional provisions enacted for the protection of plaintiffs?

3. Is the Tenth Circuit's decision—that federal courts have no power to review the actions of federal officials dealing with Indians—inconsistent with applicable decisions of this Court, where the uncontroverted allegations of plaintiffs' Amended Complaint establish as fact numerous specific violations of certain federal regulatory, statutory, treaty, and constitutional provisions which the federal defendants are legally bound to obey?

4. Is the Tenth Circuit's decision—which expressly relies upon material facts not of record, while tacitly refusing to accept as fact the uncontroverted allegations of plaintiffs' Amended Complaint—inconsistent with applicable decisions of this Court and with Fifth Amendment due process?

CONSTITUTIONAL, TREATY, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Petitioners allege that the federal defendants have violated and are continuing to violate the following provisions of federal law:

(1) The Treaty of 1868 between the United States of America and the Navajo Tribe of Indians, 15 Stat. 667, which provides in pertinent part:

> "In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled

on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher."

2. Public Law 20, March 17, 1949, 63 Stat. 14, whereby Congress authorized the transfer of Bushnell General Hospital from the War Assets Administration to the Secretary of the Interior, upon the following terms and conditions:

"...for use by the Bureau of Indian Affairs as a vocational school for Indian children and a center for housing and training adult Indians for off-reservation employment and placement..."

(3) The Due Process Clause of the Fifth Amendment to the Constitution of the United States, which provides:

"No person shall be...deprived of life, liberty, or property, without due process of law..."

(4) Public Law 280, March 30, 1968, 82 Stat. 71, 25 U.S.C.A. S 27a, which provides in pertinent part:

"Funds appropriated on or after March 30, 1968, to the Secretary of the Interior for the education of Indian children shall not be used for the education of such children in elementary and secondary education

programs in sectarian schools..."

(5) The Establishment of Religion and Free Exercise of Religion Clauses of the First Amendment to the Constitution of the United States, which provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

(6) The Act of Congress set forth in 25 U.S.C. S 286, which provides in pertinent part:

"(I)t shall be unlawful for an Indian agent or other employee of the Government to induce, or seek to induce, by...improper means, the parents or next of kin of any Indian to consent to the removal of any Indian child beyond the limits of any reservation."

(7) The Freedom of Speech and Association guaranties of the First Amendment to the Constitution of the United States, which provides:

"Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble..."

(8) The Fourth Amendment to the Constitution of the United States, which provides in pertinent part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

(9) The Right of Privacy implicit in the Ninth Amendment to the Constitution of the United States, which provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

(10 The Act of Congress set forth in 42 U.S.C. S 1981, which provides in pertinent part:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory...to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

(11) The Act of Congress set forth in 42 U.S.C. S 1985 (3), which provides in pertinent part:

> "...If two or more persons in any State or Territory conspire...for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws...in any case of of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furthurance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

(12) The Administrative Procedure Act, which grants federal jurisdiction to any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, 5 U.S.C. S 702, and which further provides, in 5 U.S.C. S 706:

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action... found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights;

"(D) without observance of procedure required by law..."

STATEMENT OF THE CASE

A. Federal Jurisdiction Bases.

Federal jurisdiction in the court of first instance was invoked by petitioners under 28 U.S.C. S 1331 (general federal question), 28 U.S.C. S 1343 (civil rights), and 5 U.S.C. SS 701-06 (Administrative Procedure Act). Their Amended Complaint alleges violations of their federally protected rights under the Navajo Treaty of 1868, under several federal statutes relating to federal Indian schools in general and to petitioners' school in particular, and under the First, Fourth, Fifth, and Ninth Amendments to the

Constitution of the United States.

B. Nature of Case.

This is a class action brought by individual Navajo students and their Indian student organization against certain federal officials and employees responsible for the policies and practices of Intermountain Indian School, a Bureau of Indian Affairs (BIA) secondary-level boarding school in Brigham City, Utah, where petitioners (plaintiffs) live and study. The plaintiffs seek injunctive relief, damages, and a declaratory judgment against the defendants.

C. Course of Proceedings Below.

Plaintiffs' original complaint herein was filed on April 30, 1971. Defendants' motion to dismiss was briefed, argued, and granted by the trial court in an order entered March 13, 1972, with leave to amend.

On April 24, 1972, plaintiffs timely filed their Amended Complaint. Defendants moved to dismiss the Amended Complaint on July 11, 1972. The motion was briefed, argued, and finally granted by the trial court on January 10, 1973. Notice of Appeal was timely filed on February 9, 1973.

The appeal was briefed and orally argued to the Court of Appeals for the Tenth Circuit, which entered final judgment on September 26, 1973, affirming the trial court's dismissal of plaintiffs' Amended Complaint.

D. Material Facts.

Each and all of the following facts are conclusively

established by the uncontroverted allegations of plaintiffs' Amended Complaint, which provides the sole factual record herein. The defendants introduced no controverting affidavits or testimony whatsoever in support of their motion to dismiss the Amended Complaint.

Hereinafter we set forth all material facts as they appear in the Amended Complaint to support each of the seven causes of action urged by plaintiffs. For the sake of brevity, we have **not** reiterated factual allegations common to several causes of action, although such factual matters are realleged in each cause of action in the Amended Complaint. Thus, the Court should keep in mind that the following statement of facts is cumulative in form, omitting redundant allegations in causes of action after the first.

[First Cause of Action]

1. The individual plaintiffs are Navajo students who live and study nine months of each year at Intermountain Indian School, a BIA boarding school located more than 500 miles from their homes on the Navajo reservation. The organizational plaintiff is the Intermountain Chapter of the National Indian Youth Council (NIYC) a national youth-oriented Indian organization which has existed for a decade and is headquartered in Albuquerque, New Mexico.

2. The defendants are officials and employees of the BIA and Department of Interior, with legal responsibility for the education of Indian students such as the individual plaintiffs herein. The only exception to this is defendant Leopardi, who is a government official employed by the federal Public Health Service (a branch of HEW), and he is responsible for the health care of the Indian students at

Intermountain School.

3. In 1868 the United States entered into a treaty with the Navajo Tribe, of which the individual plaintiffs are members. The treaty has never been altered or amended, and is still in full force and effect. The treaty, in pertinent part, reads as follows:

> "...and the United States agrees that, for every thirty children between said ages (of six and sixteen years) who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher."

4. To this day, the defendants have yet to comply with the plain requirements of said treaty. Rather than building adequate schools on the reservation and bringing in teachers who will reside among the Navajo people, as the Treaty plainly requires, defendants have been and are continuing to take Navajo children between the ages of six and sixteen from their parental homes on the reservation and are shipping said children off to live in a distant white community where their predominantly white teachers prefer to live. With respect to plaintiffs and the class they represent, in concrete terms this means that Navajo children are separated from their parents by distances in excess of 500 miles for nine months of each year, typically under economic circumstances which preclude visits or even long-distance telephone conversations with their parents.

5. Plaintiffs and the class they represent are not at Intermountain School by the free choice either of

themselves or their parents. Defendants and their predecessors in the BIA have enforced the separation of plaintiffs from their parents and tribal communities by deliberately choosing to establish and maintain off-reservation boarding schools such as Intermountain School, when it would have been and is now possible to educate all Navajo children on or near the reservation. Thus, according to an official survey of BIA schools in 1971, there were 26,000 seats available to Navajo children of school age on the reservation, of which 21,403 seats were actually used, leaving 4,597 vacancies in BIA schools on the Navajo reservation. At the same time, defendants were sending approximately 1,500 Navajo children to distant, off-reservation BIA boarding schools such as Intermountain School.

6. Defendants and their predecessors in the BIA have established and maintained Intermountain School in Brigham City, Utah, a boarding school with an all-Navajo student body located more than 500 miles from the students' homes, for three reasons which emerge clearly from the BIA's own publications:

(a) to supply an occupant for the former Bushnell General Hospital, a World War II military facility which had been closed in 1946, an institution "that had formerly cost around $14,000,000 for plant and equipment (and) seems doomed to be written off as a total loss to the Government."

(b) to provide a multimillion-dollar federal payroll for the Brigham City constituents of Sen. Arthur V. Watkins, who promoted the deal, and of present-day Utah politicians who continue to be more concerned about jobs for northern

Utah voters than about separated Navajo families and poorly educated Navajo children; and

(c) to facilitate the destruction and displacement of the Navajo cultural heritage which, but for the educational policies of defendants, the plaintiffs would otherwise be receiving from their parents and tribes on the reservation.

7. Contrary to the express requirements of the Navajo Treaty of 1868, the defendants have failed to build adequate schools on the reservation, have failed to require federal teachers to live among the Navajos, and have failed to provide teachers competent to teach the elementary branches of an English education. Virtually none of the teachers at Intermountain School speak the native language of their students, nor do they appreciate or respect the Navajo culture, despite the fact that they have been operating a school exclusively serving Navajo children for the past twenty years. According to defendants' own sworn statement in their Title I application dated April 12, 1971, of the 995 students at Intermountain School taking the California Achievement Test during the 1970-71 school year, 947 or 95% scored four or more years below that appropriate for their age group in the Language Arts area, and 644 of those students were six or more years below that appropriate for their age group. Further, although a 1971 study by Northern Arizona University showed that over 90% of Navajo parents want their children to go to college, defendants' own official records show that only 38 of 373 high school graduates from Intermountain School in 1971 have attempted to continue their education at either college or trade school, and it seems certain that considerably less than 38 of those 373 graduates are

actually in college at the present time.

8. By reason of the foregoing acts or omissions of defendants, the plaintiffs have been wrongfully and unlawfully deprived of that on reservation, competently taught, English education to which they are entitled under the 1868 Treaty between the United States of America and the Navajo Tribe of Indians, Article VI, 15 Stat. 667.

9. By reason of the aforesaid wrongful and unlawful acts or omissions of defendants, the individual plaintiffs and each member of the class they represent have been subjected to a grossly inferior education, to the damage of each in an amount in excess of $10,000 exclusive of interest and costs.

10. There is no adequate remedy at law to redress the current, continuing, and threatened future wrongful and unlawful conduct of defendants, and the plaintiffs and thier class will be irreparably injured unless defendants are enjoined from continuing their operation of Intermountain School in violation of said Treaty as aforesaid and are affirmatively enjoined to bring their educational program into compliance with said Treaty in the minimum time consistent with the location or construction of adequate facilities on the Navajo reservation and the orderly transfer of operations thereto.

11. The foregoing allegations state an actual, justiciable controversy between plaintiffs and defendants.

12. According to defendants' own official statement of position through the United States Attorney representing each and all defendants in the litigation below, the defendants (including Secretary Morton) are powerless to grant an administrative remedy in lieu of the relief sought

in the instant court proceeding:

> "The named defendants have neither the prerogative nor the power to comply with the demands of the plaintiffs that the Intermountain School be relocated on the Navajo Indian reservation; in order to comply with an order of the court requiring relocation of the school, defendants would have to have proper authorization and funding from Congress." (MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT p. 4)

[Second Cause of Action]

13. Plaintiffs have been compelled, by the educational policies and practices devised and implemented by defendants, to live away from their parents, families, and tribes during a substantial portion of their formative years.

14. In carrying out said educational policies and practices so as to require plaintiffs and their class to attend distant, off-reservation boarding schools in order to receive a supposedly ordinary, basic, high-school education (which in fact is grossly deficient by defendants' own measurements), the defendants have been and are now acting beyond their statutory authority and contrary to the intent of Congress, as expressed in Public Law 20, March 17, 1949, 63 Stat. 14, whereby Congress authorized the transfer of Bushnell General Hospital from the War Assets Administration to the Secretary of the Interior "for use by the Bureau of Indian Affairs as a vocational school for Indian Children and a center for housing and training adult Indians for off-reservation employment and placement..." Obviously, it was not the intent of Congress

to authorize defendants to establish a Navajo high school at such a remote location as Brigham City, Utah, yet that is precisely what has been done by defendants with respect to plaintiffs and most of the student body at Intermountain School. Insofar as defendants are not operating a vocational school for Indian children—and Intermountain School is presently operated as a vocational school only with respect to a small minority of its student body—the defendants are acting beyond their statutory authority, contrary to the intent of Congress, and in violation of Fifth Amendment due process.

15. As has been acknowledged in publications by defendants Wilma Victor and by Dr. William J. Benham, Jr., Assistant Area Director for education in the Navajo Area of the BIA, probably the most important factor in improving the education of Navajo children is to involve their parents in the educational process. As Dr. Benham has put it:

> "...We must use **every** opportunity present in the school environment for the students and their parents to make meaningful decisions.
>
> "Remember, the parents have more influence with their children than anyone. As educators it becomes our task, our challenge to help this influence be utilized for the benefit of the students involved.
>
> "How can this be done?" **There is probably no substitute for school visits by the parents and home visits by the teachers**, but like many aspects of Indian education, 'the answer' has not been found. How to do

this will challenge the ingenuity of all. But there is no doubt it must be done..."
(Benham, A Foundation for Indian, Cross-Cultured Education, A JOURNAL OF AMERICAN INDIAN EDUCATION—January, 1969 at p. 31) (Emphasis added.)

Thus, the location of Intermountain School at a point so distant that "school visits by the parents and home visits by the teachers" seldom if ever take place must provide a major reason why Intermountain School suffers the following deficiencies, as sworn to by defendants in their 1971 application for Title I funds:

(a) Only 38 of 373 graduating seniors planned any post-high school education, including vocational school.

(b) 41% of the students at Intermountain School demonstrated negative behavior and/or attitudes.

(c) 24% of the students at Intermountain School were involved in excessive use of alcohol and various drugs during the 1970-71 school year.

(d) 633 cases of negative behavior by students were further defined as 350 referrals to counselors for fighting, excessive profanity, etc., 313 cases where students were incarcerated (220 were alcohol-related), and 145 cases of chronic attendance problems.

(e) 42 students failed their academic subjects by cutting classes, for reasons documented by the professional staff such as disorientation in the boarding school environment, chronic absenteeism in the past, history of repeated failure in academic subjects at other schools, family problems on the reservation, and defiance of

authority in general.

(f) 296 students cut classes enough to have their academic grades reduced, short of failure.

(g) Approximately $13,000 is spent each year at Intermountain School in repairing school facilities damaged by vandalism, including 300 to 500 windows broken every month.

(h) Of the top 51 senior students in the senior class of 401 students, 60% of those top students scored below the 20th percentile in Social Studies in the A.C.T. test given at Intermountain School in November of 1970. The students' deficiencies were determined by defendants to have resulted from an inability to read and comprehend material dealing with history, politics and economics.

(i) 39% of the students tested by defendants demonstrated a lack of basic consumer skills such as enough mastery of mathematics to compute a budget for family food and housing.

(j) Several standard reading tests showed that 800 of the students at Intermountain are at least 3.7 years behind that appropriate for their age group in reading skills.

(k) Of 995 students taking the California Achievement Test during the 1970-71 school year, 95% scored four or more years below that appropriate for their age group in reading skills. And of the 995 students tested, 644 students were six or more years below that appropriate for their age group.

(l) Of 617 freshmen and sophomores taking a departmental science test in 1969-70, not a single student scored higher than 39% on the test.

(m) Of 1,026 students taking the California

Achievement Test for mathematics during 1970-71, 96% of the Intermountain students scored in the bottom 20 percentiles when compared with national norms.

(n) Of 951 students taking the SRA Basic Skills in Arithmetic test in January of 1971, 732 of the Intermountain students scored below the 10th percentile.

[Third Cause of Action]

16. The defendants have been and are continuing to discourage plaintiffs and other Navajo students at Intermountain School from practicing either their traditional Navajo religion or the ceremonies of the Native American Church; on the other hand the defendants show favoritism toward the Christian religion by such obvious means as an official Christmas message which was signed by defendant Jaeger, acting on behalf of Intermountain School in December, 1971, which message bore an illustration of a Navajo woman, holding an infant, in a simulation of the Christian nativity scene. Defendants and other government employees under their control have further shown disrespect to traditional Navajo religious beliefs by failing to observe Navajo customs honoring the dead, as exemplified by the fact that the body of Henry Wilson, an Intermountain student who hung himself in a Brigham City jail on or about February 5, 1972, was taken to Farmington, New Mexico and left there unattended by an employee under defendants' supervision. If the defendants had any respect for the Navajo ways, after 20 years of operating a Navajo school they would know the religious significance involved in having someone watching and listening with the body of the deceased boy until his

burial. A further specific example of defendants' disdain for the traditional Navajo religion is embodied in defendants' official support of the Intermountain Navajo Folk Art Theatre troupe, a group of well-meaning but misinformed Navajo students who have been led by a white employee of defendants into performing traditional ceremonies at improper times and places, turning beautiful Navajo celebrations into Disney-style show business for the amusement of people like defendants who apparently think Navajo ways of worship are quaint and amusing. At the same time, by means such as defendant Jaeger's official Christmas greeting to all parents of Intermountain School students, the defendants continually foster an attitude of respect and reverence for the Christian religion, such that Intermountain School obviously favors the Christian religion over either the traditional Navajo religion or the Native American Church, to a degree that defendants are in truth and in fact operating a sectarian school within the meaning of Public Law 280, March 30, 1968, 82 Stat. 71, 25 U.S.C.A. S 278a, which provides:

> "Funds appropriated on or after March 30, 1968, to the Secretary of the Interior for the education of Indian children shall not be used for the education of such children in elementary and secondary education programs in sectarian schools..."

17. Defendants are not only misusing federal funds in a manner contrary to the intent of Congress as expressed in Public Law 280, but by their favoring the Christian religion and disfavoring the traditional Navajo religion and the Native American Church they are violating both the establishment clause and the free exercise clause of the

First Amendment.

18. In view of defendants' asserted inability to transfer the educational functions now performed at Intermountain School to the reservation, it would be utterly futile to petition defendants for administrative relief sought by plaintiffs herein, for the reason that the traditional Navajo religion cannot be practiced away from the Navajo homeland and similarly the defendants have made clear their determination not to let members of the Native American Church conduct their sacred peyote ceremonies at Intermountain School, even though the use of peyote is lawful for members of the Native American Church both under Utah state law and under the law of the Navajo nation.

[Fourth Cause of Action]

19. The defendants have been and are continuing to obtain by improper means the consent of Navajo parents, of plaintiffs and other students at Intermountain School, to the removal of such students beyond the limits of the Navajo reservation, contrary to the letter and intent of the Act of Congress set forth in 25 U.S.C. S 286, which provides:

> "No Indian child shall be sent from any Indian reservation to a school beyond the State or Territory in which said reservation is situated without the voluntary consent of the father or mother of such child if either is living, and if neither of them is living without the voluntary consent of the next of kin of such child. Such consent has been voluntarily given before such child shall be removed from such reservation.

And it shall be unlawful for any Indian agent or other employee of the Government to induce, or seek to induce, by withholding rations or by other **improper means, the parents or next of kin of any Indian to consent to the removal of any Indian child beyond the limits of any reservation."** (Emphasis added.)

20. One improper means used by defendant to induce Navajo parents to send their children to Intermountain School is to falsely represent to said parents that the only available school for their children is Intermountain School, when in truth and in fact other BIA schools have been and are available for such students to attend either on the reservation or at locations much closer to home than Brigham City, Utah. For example, in the summer of 1971, the defendants employed a Navajo college student from the University of New Mexico named Robert Tohe to do social services work in the Fort Defiance Agency on the reservation. Part of Mr. Tohe's official duties was to assist Navajo parents with placing their children in BIA schools. At the beginning of the summer, Mr. Tohe was instructed by defendants (or persons under their supervision) to tell all parents with high-school-age children that the only BIA schools available were Albuquerque Indian School and Intermountain School. Approximately midway through the summer, Mr. Tohe was similarly instructed to tell such parents that Albuquerque Indian School was filled and that the only "choice" was Intermountain School. Notwithstanding such instructions, official statistics now reveal that in 1971 there were 4,595 vacancies in BIA schools on the Navajo reservation, and at the time Mr. Tohe was in good faith telling Navajo parents that their only "choice" was

Intermountain School, in truth and in fact there were a substantial number of vacancies available for the children of those parents at BIA schools on or near the reservation. The defendants either knew or should have known that such parents were being given false information which induced them to consent to sending their children more than 500 miles away, beyond the limits of the Navajo reservation, to Intermountain School. The motive of defendants in perpetrating this fraud upon Navajo parents is as obvious as it is despicable—defendants are less concerned about the unity of Navajo families and the welfare of Navajo children than they are about maintaining the flow of federal money into the pockets of white employees and merchants of Brigham City, Utah.

21. Another improper means used by defendant to induce Navajo parents to send their children to Intermountain School is to fail to inform said parents of the criteria which defendants purport to use in deciding which students should be placed in which BIA schools. For example, after the initial complaint was filed herein, the Acting Superintendent of Intermountain School publicly stated that approximately 40% of the students at Intermountain School were "social placements"—which means that those students had exhibited behavioural problems or social adjustment problems before they were referred to Intermountain School. Yet the parents of plaintiffs and of many other Intermountain School students were not informed that they would be sending their children to a school with such a student body when they signed the consent forms required by 25 U.S.C. S 286. Similarly, defendants have generally failed to explain to

Navajo parents the criteria by which defendants supposedly make pupil placement decisions concerning Navajo children, effectively depriving Navajo parents of the opportunity to make an informed choice and, therefore, a voluntary consent. Defendants are not incapable of providing such information to Navajo parents; rather, defendants deliberately refrain from providing such information because uninformed parents are unable effectively to object to the inequities which exist in the placement of Navajo children in the various BIA schools under defendants' control, leaving defendants free to place Navajo students where they will do the most economic good for BIA employees and white communities which profit from BIA schools.

22. Another improper means used by defendants to induce Navajo parents to send their children to Intermountain School is to falsely represent to such parents that Intermountain School is a fine, high-quality educational institution, when in truth and in fact the school is grossly deficient as the defendants well know. Since the filing of the instant lawsuit in May, 1971, defendants have mounted a massive public relations campaign designed to give Intermountain School a public image, both on the Navajo Reservation and in the State of Utah, as an exemplary school for Navajo youth. Throughout this propaganda barrage, defendants were careful to hide the facts recently discovered by plaintiffs in the Title I application which defendants submitted for federal funding on April 12, 1971, less than a month before the instant case was filed. As set forth in detail in paragraph 15 hereinabove, in order to get their hands on more federal

money the defendants have admitted in a certified statement that Intermountain School is an educational disaster and a social tragedy. The defendants have been and are now fully aware of those truly deplorable conditions yet they have deliberately chosen to mislead Navajo parents by false statements in order to induce those parents to consent to send their children off the reservation to Intermountain School.

23. In improperly inducing Navajo parents to consent to send their children to Intermountain School, defendants not only violate the letter and spirit of 25 U.S.C. S 286 but they also violate the due process clause of the Fifth Amendment.

[Fifth Cause of Action]

24. By defendants' deliberate policy of forcing plaintiffs and other Navajo students to attend off-reservation boarding schools such as Intermountain School in order to obtain a supposedly standard high-school education (which is in fact grossly substandard as hereinabove documented by defendants' own written admissions, set forth in paragraph 15 hereinabove), the defendants have been and are continuing to violate the First Amendment rights of plaintiffs and their parents, in that:

(a) Defendants are effectively prohibiting the free exercise of the traditional Navajo religion, which can only be learned and practiced by Navajo youth living with their Navajo parents and elders in the Navajo homeland.

(b) Defendants are effectively prohibiting the free exercise of the religion of members of the Native American Church, an important and sacred part of which involves the

use of peyote in religious ceremonies. The defendants have been and are now actively discouraging Navajo students from conducting such peyote ceremonies, even though peyote use is lawful for members of the Native American Church in the State of Utah as well as on the Navajo reservation.

(c) Defendants are effectively engaged in the establishment of the Christian religion at Intermountain School, through the actions of defendant Jaeger and other government employees as more particularly alleged in paragraph 16 hereinabove.

(d) Defendants are effectively abridging plaintiffs' right freely to speak and associate with their parents, families, clans, and tribal communities by unreasonably and unnecessarily requiring plaintiffs to leave the reservation and spend nine months of each year in a boarding school which is physically so remote from their homes that any kind of communication with their parents is difficult and home visits are virtually impossible.

25. The foregoing policies and practices of defendants are not explicable in terms of ignorance or neglect on the part of defendants but are rather the conscious continuation of a long-time, deliberate BIA policy of destroying Indian religion and culture, in order that Indian children may be trained in the ways of the white man. Said policy is succinctly summarized in an official BIA publication entitled "Questions Commonly Asked About Intermountain School." In answer to one of the final questions in the publication, inquiring as to the difference between Intermountain School and ordinary (white) public schools, said BIA publication explains:

"The essential difference is that public schools have the task of preserving the prevailing customs of our society, namely the same language, same costume, same diet, housing social customs and civic responsibilities. The task of Intermountain School is to change language, change diet, costume, housing, manners, customs, vocations and civic duties. Changing people's habits and outlooks is one of the most complex tasks in human affairs."

As defendants are well aware, it is much easier to change the habits and outlooks of Navajo children if they are separated from their parents and tribal communities during the major part of their formative years, which is precisely what defendants are continuing to do at Intermountain School.

26. Although defendants plead economic necessity and vaguely talk of plans to construct schools on the Navajo reservation adequate to accomodate all Navajo children in need of education in federal schools, in fact there is no reason to expect that defendants will perform any better than their BIA predecessors who have failed to honor their legal obligation to provide such schools for more than 100 years. Immediately after the original complaint was filed herein, defendant Hawkins told the Washington Post that he was opposed to sending Indian children away from their parents to boarding schools, and that he planned to close out the secondary-school functions of Intermountain School with respect to Navajo children by the fall of 1973. Shortly thereafter defendant Jaeger, speaking as the newly installed Superintendent of Intermountain School, told an interviewer that he foresaw no change in the role of

Intermountain School in Navajo education in the future. A short time later, on July 4, 1971, the Salt Lake Tribune printed a story in which defendant Jaeger announced the expenditure of $1.3 million by defendants at Intermountain School for the purpose of remodeling and refurnishing 28 dormitories and re-equipping the entire kitchen. Since last summer all public statements by defendants have been to the effect that they are basically satisfied with the continued operation of Intermountain School as a Navajo secondary school and that they have no plans to change its present functions in that regard. Political and economic pressures exerted by the white population of northern Utah have been and are so great that defendants will continue to sacrifice the First Amendment rights of plaintiffs unless and until this court grants them the relief to which they are entitled under the Constitution of the United States.

[Sixth Cause of Action]

27. The defendants have violated and are violating the rights of plaintiffs and their class under the due process clause of the Fifth Amendment of the Constitution of the United States, in that:

(a) In failing and refusing to provide adequate and sufficient schools to educate plaintiffs on the Navajo reservation so that they can be with and learn from their parents while they are in high school, defendants are depriving plaintiffs and their parents of the "liberty" of individual Americans to bring up their own children and participate meaningfully in their education, as the term "liberty" has been construed by the Supreme Court of the United States in such decisions as **Meyer v. Nebraska**, 262

U.S. 390 (1923) and **Pierce v. Society of Sisters**, 268, U.S. 510 (1925).

(b) In requiring plaintiffs to attend a secondary school which is grossly substandard even by defendants' own certified statement as set forth in paragraph 15 hereinabove, defendants are depriving plaintiffs of their "property" without due process of law. Defendants have a legal obligation to provide plaintiffs with a secondary education which will enable plaintiffs to function normally in the dominant white society, if plaintiffs should choose or be compelled to subsist in that society. Plaintiffs have a corresponding property right to be afforded such an education, which right has been and is being violated by educational policies and practices of defendants that are producing supposed high-school graduates from Intermountain School, who, on the average, perform at a pre-high school level in basic skills such as reading, writing, and arithmetic.

(c) In failing and refusing to fully inform plaintiffs and their parents of vacancies which exist in BIA and other schools on the reservation, in order that defendants may maintain full employment for the benefit of BIA employees and townspeople financially dependent upon Intermountain School, the defendants have been and are violating procedural due process and are denying plaintiffs and their parents, fair and equitable treatment vis-a-vis other Navajo students and parents, in violation of Fifth Amendment due process as construed by the Supreme Court of the United States in such decisions as **Bolling v. Sharpe**, 347 U.S. 497 (1954).

[Seventh Cause of Action]

28. Defendants have maintained and continue to maintain a policy and practice of injecting thorazine into the bodies of Navajo students at Intermountain School deemed by defendants to be alcoholically intoxicated. This is a highly dangerous use of said drug and is directly contrary to the instructions given to prescribing physicians by the manufacturer of thorazine, Smith, Kline & French Laboratories, who explicitly caution that said drug may be dangerous or even lethal if administered to a patient with significant amounts of alcohol in his blood stream. Said use of thorazine is not only dangerous but totally unnecessary, for the reason that intoxicated Navajo students have been and are routinely handled by BIA school officials at locations other than Intermountain School, without resort to tranquilizing Navajo youth as if they were unruly animals. Said policy and practice of defendant Leopardi, with the cooperation and approval of the remaining defendants, violates the rights of plaintiffs (and the class they represent) under the Fourth, Fifth, and Ninth Amendments to the Constitution of the United States, under 42 U.S.C. SS 1981, 1985, and 200d, and under 5 U.S.C. SS 701-06.

29. Defendants maintain a policy and practice of requiring Instructional Aides to observe and record even trivial incidents with plaintiffs and other students in the dormitories, which incidents are written in a log and then transferred into the permanent file of each student involved. Such behavioral records are not ordinarily disclosed to the affected students but are disclosed to numerous Intermountain School employees, to other schools, and to at least some future employers. Said acts of

defendants violate the rights of plaintiffs under the Fifth and Ninth Amendments, and under 5 U.S.C. SS 701-06.

30. Defendants have conspired with or otherwise induced private merchants in Brigham City to refuse to sell alcoholic beverages to any student from Intermountain School, including students of legal age to buy such beverages. Defendants have similarly conspired with or otherwise induced private merchants at Carr Plaza, in Brigham City, to place special restrictions which do not apply to white students or to anyone else than Indian students. Said acts of defendants violate the rights of plaintiffs (and the class they represent) under the First and Fifth Amendments, under 42 U.S.C. SS 1981, 1985, and 2000d, and under 5 U.S.C. 701-06.

31. Defendants have knowingly tolerated and taken no disciplinary action against certain Intermountain School employees who have been attempting to dissuade plaintiffs and other students from associating with Gerald Wilkinson, National Executive Director of NIYC, or with Richard L. Young, Attorney of Record for plaintiffs herein, by spreading false and malicious rumors that Mr. Wilkinson and Mr. Young are Communists and that NIYC is a Communist organization. For example, on the evening of April 14, 1971, one NIYC member named Evelyn Reeder was called into the office of Mrs. Andrews and by two other school employees, Mrs. Choyou and Mrs. Fobb, who variously called Miss Reeder a troublemaker and Mr. Wilkinson a Communist. For another specific example, on the morning of June 2, 1971, a Navajo employee sympathetic to plaintiffs was accosted by Mrs. Marion A. Newbold, an art teacher at Intermountain School. Mrs.

Newbold then falsely and maliciously stated to the Navajo employee, Mrs. Emma Delgarito, that Mr. Young was a Communist and so was Mr. Wilkinson and his NIYC organization, urging Mrs. Delgarito and plaintiffs to have nothing to do with Mr. Young or Mr. Wilkinson. At various other times before and since the aforementioned incidents, Miss Reeder and other members of plaintiffs' Chapter of NIYC have been personally confronted and verbally attacked upon similar grounds by defendants Speaks, Earl, Nay, Tanner, and Smith. Said false statements and verbal attacks have been made by defendants for the purpose of intimidating plaintiffs and other students from peacefully speaking or organizing student support of Indian power and self-determination. Said acts and omissions of defendants violate the rights of plaintiffs under the First and Ninth Amendments, under 42 U.S.C. SS 1981, 1985, and 2000d, and under 5 U.S.C. SS 701-06.

32. Defendants maintain a policy and practice of combining academic performance with deportment of students at Intermountain School, such that a student's grades in an academic subject may bear little or no relation to his academic performance in that subject. For example, since plaintiff DeJolie has become known to be President of plaintiff NIYC Chapter and an advocate of Indian self-determination, her academic grades have declined markedly even though she is doing the same quality of work as before. Similarly, after Miss Reeder became known as an active member of plaintiff NIYC Chapter last spring, Miss Reeder was dropped from consideration as Valedictorian of her graduating class even though her academic

performance continued to be as outstanding as it had previously been. Similarly, after Jody Allen became known as an active member of NIYC last spring, his grades dropped even though he continued to perform at his previous level of academic excellence. Similarly, after Lola Begay became known as an active member of NIYC, defendants showed so little interest in her further education that they failed to advise her of the existence of a BIA grant for higher education (which she first learned of from counsel for plaintiffs in July, 1971, after she graduated from Intermountain School), even though Miss Begay was Secretary of her Senior Class, carried approximately a 3.5 average, and was selected to introduce Navajo Tribal Chairman Peter McDonald at the 1971 graduation ceremony at Intermountain School. Said acts and omissions of defendants violate the rights of plaintiffs under the First, Fifth and Ninth Amendments, under 42 U.S.C. SS 1981, 1985, and 2000d, and under 5 U.S.C. SS 701-06.

33. During the past school year of 1971-72, defendants refused to permit any Intermountain School student to go home during Christmas vacation, on the stated grounds that many students couldn't afford to pay their way home and that it would be unfair to let the more affluent students go home when others were forced by poverty to stay at school. At the same time, defendants were telling Indian students in the same federal school system at Chilocco Indian School that they all had to go home during the Christmas holidays and that defendants would pay their way if necessary (and in fact defendant Hawkins has since

admitted in writing that he authorized the expenditure of more than $10,000 to sent the Chilocco students home for Christmas). Such unfair and inequitable acts and omissions of defendants are in violation of plaintiffs' rights under the Fifth Amendment, and under 5 U.S.C. SS 701-06.

34. Defendants maintain a policy and practice, either directly by the use of campus patrol employees or indirectly through agreement with the local law-enforcement authorities of meeting public buses at off-campus stops and subjecting plaintiffs and other Indian students to inspection for evidence that they have been drinking, which inspection is done in full view of other people in and around said buses and is directed solely to Indian students. Said acts of defendants are in violation of plaintiffs' right under the Fifth and Ninth Amendments, under 42 U.S.C. SS 1981, 1985, and 2000d, and under 5 U.S.C. SS 701-06.

35. Despite long-standing and explicit BIA regulations which prohibit BIA employees from striking Indian students, the defendants have knowingly or negligently permitted employees at Intermountain School to strike Navajo students without taking any disciplinary action against such employees. For example on the morning of April 10, 1972, an employee named Hansen took plaintiff Begay into a closed room and punched him violently in the chest, without any legal or other valid justification. Plaintiffs promptly made a personal complaint about the incident to defendant Jaeger, who replied that unless there was a witness to the incident other than Mr. Begay, there was nothing that defendant Jaeger could do about it. The same employee during the current school year has also struck at least one other student, James Tsosie, without

sufficient provocation and without any disciplinary action on the part of defendants. Further, some of the students presently at Intermountain School vividly remember the same employee, Mr. Hansen, from their elementary school days at Teec Nos Pos, where they witnessed Mr. Hansen requiring small Navajo children to stand rigidly in place until they collapsed on the floor. Another Intermountain School employee in Building 40 named Reese White was disciplining Navajo boys in his dormitory by striking them with a metal pipe until approximately December 7, 1972, when some of the boys gained possession of the pipe and gave it to another employee for safekeeping. The foregoing are exemplary of frequent and widespread violations by Intermountain School employees of long-standing BIA regulations against corporal punishment of Indian children by BIA employees, which violations either are actually known to and condoned by defendants or should be known to defendants in the reasonably diligent performance of their duties, yet the defendants have wholly failed and refused to take appropriate administrative action to ensure that corporal punishment is effectively eliminated at Intermountain School. Said acts and omissions of defendants are in violation of plaintiffs' rights under the Fourth, Fifth and Ninth Amendments, under 42 U.S.C. SS 1981, 1985, 2000d, under 5 U.S.C. and under BIA Personnel Policy 752-2.

36. Defendants operate a so-called counseling program at Intermountain School which utterly fails to meet the educational, social, or moral problems faced by plaintiffs and other students. As indicated by official records in the Tribal Scholarship office and the Navajo Area BIA Higher

Education Grants office in Window Rock, a disproportionately small number of Intermountain graduates go on to college, as compared with Navajo graduates of BIA schools and public school on the reservation, a result largely of defendants' failure to effectively counsel and encourage Intermountain students to go to college. Similarly, although defendants' own Title I application shows that 24% of the students at Intermountain School were involved in excess use of alcohol and various drugs during the 1970-71 school year, defendants have failed to provide an effective program to deal with the problem either in a preventive way or as individual problems arise. As a specific example of the latter aspect of the problem, during the current school year the defendants dealt with an intoxicated and obviously depressed student, who had just fought with his girl friend, by calling the Brigham City Police and having the boy thrown in jail, where he promptly hung himself as soon as he was left alone in a cell. Since the latter suicide, at least three other Intermountain students have made suicide attempts, yet defendants have done nothing to train dormitory employees to identify and deal with Navajo youth who may evidence suicidal tendencies. In view of the fact that young Indian males are statistically more prone to suicide by a factor of four than are white males of the same age group, a fact which is or ought to be well known to defendants, the failure of defendants to devise and implement suicide prevention programs is inexcusable. Similarly, defendants have failed effectively to deal with a continuing and apparently worsening problem of forcible rapes and sexual promiscuity as to certain

female students at Int ountain School during the current school year. Wit t naming names of the girls victimized, plaintiffs kn of at least two forcible rapes which defendants have e vored to cover up, not for the protection of the girls in ved but to protect the public image of Intermountain hool. Plaintiffs also know of several instances in which ls found by defendants to have been sexually promiscuo ave been given birth control pills rather than the kin f moral guidance they would have been given by their nts and elders at home on the reservation. Said acts an missions by defendants are in violation of the rights plaintiffs and the class they represent, under the Fift nd Ninth Amendments under 42 U.S.C. SS 1981, 1985, 2000d, and under 5 U.S.C. SS 701-06.

37. Defendants' failu nd refusal to recruit and hire Navajos for teaching other responsible jobs at Intermountain School h een demoralizing to plaintiffs and other Navajo studen t Intermountain School. When Intermountain School w pened approximately 20 years ago, about 70% of the em yees were Indian. Now, after 20 years of supposed Indian ference in hiring by the BIA, a minority of the school ployees are Indian and the Indians are most nume in the least prestigious jobs. For a concrete examp as of August 29, 1971, the Guidance Department (h is unusual in having a bare majority of Indians in t epartment, as opposed to the Academic Department, h is overwhelmingly white) had the following employee akdown:

TOTAL EMPLOYEES—131 (All GS ratings)
Indian—69
White—56
Unknown—6
SUPERVISORS—10 (Highest GS ratings)
Indian—2
White—8
GUIDANCE COUNSELORS—16 (Next highest GS ratings)
Indian—3
White—13
DORMITORY MANAGERS—14 (Second lowest GS ratings)
Indian—10
White—3
Unknown—1
INSTRUCTIONAL AIDES—91 (Lowest GS ratings)
Indian—54
White—32
Unknown—5

When plaintiffs and other Navajo students look around them and see who gets the best jobs and who gets the lowest-paying and most menial jobs, it is no wonder that only 10% of last year's graduating class at Intermountain School even bothered to make plans to go to college or trade school. By perpetuating and even worsening this kind of employment model for plaintiffs and other Navajo students to live in and observe, defendants are violating plaintiffs' rights under the Fifth Amendment, under 42 U.S.C. SS 1981, 1985, and 2000d, and under 5 U.S.C. SS

701-06

38. The aforementioned acts and omissions of defendants demonstrate their inability or unwillingness to grant effective administrative relief with respect to any of the problems complained of by plaintiffs hereinabove.

ARGUMENT

Although this petition directly implicates only certain procedural doctrines which were grossly misapplied by the courts below, we think it essential that this Court understand what is at stake in the instant case, if and when the merits are reached.

This case presents the first serious legal challenge by Indians to the federal system of education for Indians.

At a time when other parents are fighting bitterly over the busing of their children within the City of Los Angeles or across suburban Virginia county lines, Navajo parents are still having to send their children off hundreds of miles to BIA boarding schools for nine months of each year. It would be the ultimate in racism to assume that Indian parents willingly surrender the care and custody of their children to such distant, alien institutions, and of course the truth is otherwise. If there is anything distinctive about Indians in general, and Navajos in particular, it is the deep religious and cultural roots which they have so tenaciously preserved, linking them to their ancestors and their ancestral homelands. That distinctive sense of place and self lies at the heart of the instant case.

In sum, petitioners seek only the opportunity to get a decent high-school education while living among their own Navajo people in their sacred homeland.

1. Sovereign Immunity Is No Bar To Suit Against Officials Acting Beyond Or Contrary To Their Statutory Authority Or In An Unconstitutional Manner.

The doctrine of soverign immunity is not operative to bar an equitable suit for prospective relief against federal

officials who are acting beyond or contrary to their statutory authority, or in an unconstitutional manner. **Philadelphia Co. v. Stimson**, 223 U.S. 605 (1912); **Dugan v. Rank**, 372 U.S. 609 (1962).

At page 5 of its opinion below, the Tenth Circuit described the grounds for its decision as follows:

> "Appellants have set forth numerous allegations of error on appeal. We will consider only whether the trial court properly applied the doctrine of soverign immunity in ordering the dismissal of the amended complaint. We hold that the Court did not err. See **National Indian Youth Council v. Bruce**, 366 F. Supp. 313 (D. Utah 1973).

Immediately following the statement just quoted, the Tenth Circuit set forth its entire **ratio decidendi** for that conclusion about sovereign immunity, as follows:

> "United States District Courts are courts of limited jurisdiction...(Citation omitted.) No presumptions of federal jurisdiction exist....(Citation omitted.) Courts may not entertain unconsented suits which, though nominally against officers of the United States, are in reality against the Government itself. **Dugan v. Rank**, 372 U.S. 609 (1963); **McQueary v. Laird**, 449 F.2d 608 (10th Cir. 1971).
>
> The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, "**Land v. Dollar**, 330 U.S. 731, 738 (1947), or if the Government from acting, or to compel it to act." **Larson v. Domestic & Foreign**

Corp., supra, at 704 **Ex parte New York**, 256 U.S. 490, 502 (1921). **Dugan v. Rank, supra**, at 620.

> This action was clearly one against the United States, even though it was not sued in its sovereign capacity, The judgment sought would expend itself on the federal treasury. The United States did not consent to be sued. The trial court was without jurisdiction."

What the Tenth Circuit neglected to add was that under all relevant decisions of this Court, including those cited by the Tenth Circuit, the "general rule" does not apply to equitable suits against federal officials acting beyond or contrary to their statutory authority, or in an unconstitutional manner. As the foregoing Statement of the Case makes clear, plaintiffs' Amended Complaint is fairly bristling with uncontroverted allegations of specific, **ultra vires** and/or unconstitutional conduct by defendants.

The Tenth Circuit's sweeping misuse of the doctrine of sovereign immunity also embraced plaintiffs' well pleaded damage claims against the individual defendants, which obviously are not barred by that doctrine and which may not properly be summarily dismissed on grounds of official privilege or immunity, under **Doe v. McMillan**, 41 Law Week 4752 (S. Ct. 5/29/73).

2. **The "Political Question" Doctrine Has No Application To The Instant Case.**

After plainly stating that "we will consider only whether the trial court properly applied the doctrine of sovereign immunity," the Tenth Circuit then blithely went on to add other purported justifications for declining to hear the merits of the instant case. Although the Tenth Circuit's

language is so garbled as to leave its intention in doubt, the court appears to be saying that plaintiffs' Amended Complaint raises nothing other than non-justiciable "political" questions:

> "District courts are also without jurisdiction when confronted with non-justiciable political questions, such as determining the status of Indian tribes. **Baker v. Carr**, 369 U.S. 186 (1962). Congress has exclusive plenary legislative authority over Indians and all of their tribal relations. **Lone Wolf v. Hitchcock**, 187 U.S. 553 (1903). This court has recognized the plenary power of Congress to control and manage the affairs of its Indian wards. **Wolfe v. Phillips**, 172 F.2d 481 (10th Cir. 1949), cert. denied 336 U.S. 968 (1949); **Taylor v. Tayrien**, 51 F.2d 884 (10th Cir. 1931).

Opinion (Appendix A hereto), p.6.

Even in a clearly "political" case such as **Baker v. Carr**, this Court held that federal courts **have** jurisdiction to adjudicate judicially manageable issues involving the interpretation of pertinent constitutional and statutory provisions. And of course the instant case in no way involves "the status of Indian tribes," or any other issue which remotely relates to the "political question" doctrine. In the words of Justice Holmes, "the objection that the subject matter of the suit is political is little more than a play on words." **Nixon v. Herndon**, 273 U.S. 536, 540 (1927).

As for the Tenth Circuit's suggestion that the power of Congress to deal with Indians is operative to defeat federal jurisdiction over plaintiffs' Amended Complaint, we would

simply point out that:

(1) Plaintiffs make no claim inconsistent with the power of Congress to deal with Indians under the Constitution. To the contrary, plaintiffs assert several claims dependent upon pertinent Acts of Congress which defendant officials are deliberately violating.

(2) There is no magic in the Commerce Clause. Like any other provision of the Constitution, the Commerce Clause must be read in light of other limiting provisions, including those in the Bill of Rights. This Court has clearly held that actions of both Congress and the Executive Branch under the Commerce Clause are subject to judicial review by the federal courts under the Fifth Amendment. **United States v. Klamath & Moadoc Tribes**, 304 U.S. 119, 123 (1938); **United States v. Creek Nation**, 295 U.S. 103, 110 (1935). Unquestionably, similar limitations are imposed by the First, Fourth, and Ninth Amendments, all of which are invoked by petitioners.

3. The "Unreviewable Discretion" Doctrine Has No Application To The Instant Case.

As a further apology for its decision, the Tenth Circuit apparently concludes that each and all of the claims asserted in plaintiffs' Amended Complaint involve nothing other than unreviewable discretionary acts by defendant officials:

> "The trial court's dismissal is further buttressed by the rule that great deference should be afforded to interpretations by the agency charged with the duty of carrying out statutory mandates. **Udall, Secretary of the Interior v. Tallman**, 380 U.S. 1 (1965); **Garvey v.**

Freeman, 397 F.2d 600 (10th Cir. 1968). Credence should be particularly accorded those who are working with treaties. **Kolovrat v. Oregon**, 366 U.S. 187 (1961). Courts cannot substitute their judgment for that of those working with Indians, empowered to exercise discretion. **Board of Com'rs of Pawnee County, Okl. v. United States**, 139 F.2d 248 (10th Cir. 1943). In no event should a court direct the manner in which discretionary acts are to be performed, nor may it direct or influence the exercise of discretion in making that decision. **McQueary v. Laird, supra**..."

Opinion (Appendix A hereto), p.7.

Assuming, as we must, the ability of the Tenth Circuit to read and understand the English language, we are at a loss to explain why the court would apply the foregoing compendium of platitudes to the instant case. The Amended Complaint is filled with particularized allegations of specific violations by named defendants of the Navajo Treaty of 1868, of several other particular Acts of Congress, and of the First, Fourth, Fifth, and Ninth Amendments to the Constitution of the United States. Their is not and never has been any legal authority for the proposition that defendants may with impunity violate the statutory and constitutional rights of plaintiffs. The fact that plaintiffs are Indians, or that defendants are "working with Indians," does not immunize the unlawful and unconstitutional conduct of defendants from judicial scrutiny. **Tooahnippah v. Hickel**, 397 U.S. 598 (1970).

4. **The Tenth Circuit Improperly And Unconstitutionally Considered Facts Not Of Record and Refused To**

Consider Facts Of Record.

It is elemental that the well-pleaded allegations of plaintiffs' Amended Complaint must be taken as verities upon a motion to dismiss. See, **e.g., United States v. Students Challenging Regulatory Agency Procedures**, 41 Law Week 4866 (S. Ct. 6/18/73).

The uncontroverted allegations of plaintiffs form the entire factual basis for the instant appellate proceeding, and the statement of "Material Facts" hereinabove is taken verbatim from the Docketing Statement and Brief submitted to the Tenth Circuit. When the Tenth Circuit's opinion is compared with the record before that court, it is obvious that the Tenth Circuit either did not bother to read the record or deliberately refused to accept plaintiffs' allegations as fact.

Moreover, the Tenth Circuit's opinion recited (purportedly as a matter of material fact) certain factual assertions not of record. For example, on page 3 of the court's opinion, the Tenth Circuit asserts:

> "...The school has been endorsed by the Navajo Tribal Educational Committee 'as long as the need exists' for educating 'retarded two or more grades' students at off-reservation federal schools."

The record before the Tenth Circuit contained no such "fact." We can only guess that the court went back, behind plaintiffs' Amended Complaint, to dredge up this "fact" from one of the Government's affidavits which were submitted in conjunction with defendants' motion to dismiss the original complaint of plaintiffs. We trust that no authority is needed for the proposition that earlier

pleadings are superceded by later pleadings. And in the instant case the defendants did not file any affidavits, either in original form or by way of reference, in support of their motion to dismiss plaintiffs' Amended Complaint. Thus, there is simply no support in record for the Tenth Circuit's statement of "fact" quoted above, and we have no way of knowing what other extra-record "facts" the court may have considered in reaching its decision.

Surely, the most rudimentary concepts of Fifth Amendment due process include the requirement that an appellate court rule on the basis of known facts of record. **Cf. Ohio Bell Tel. Co. v. Public Utilities Comm'n**, 301 U.S. 292 (1937).

CONCLUSION

The Court of Appeals has clearly decided a federal question in conflict with applicable decisions of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, within the meaning of Rule 19.

In view of the egregious nature of the errors below, and of the unconscionable delays to which plaintiffs have already been subjected (they have not even been permitted to begin discovery since they commenced the instant injunctive proceedings on Law Day, April 30, 1971), the Court should grant the writ, with instructions to proceed to the merits of plaintiffs' Amended Complaint without further delay.

Respectfully submitted,

/s/ Richard L. Young, Raymond Ickes
NATIVE AMERICAN LEGAL DEFENSE
& EDUCATION FUND, INC.
1015 Tijeras, N.W.
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Attorney for Petitioners

APPENDICES

Appendix A—Opinion of the United States Court of Appeals, Tenth Circuit

Appendix B—Opinion of the United States District Court, District of Utah

APPENDIX A

NATIONAL INDIAN YOUTH COUNC INTERMOUNTAIN INDIAN SCHO CHAPTER, an unincorporated asso tion, et al., Plaintiffs-Appellants,

v.

Louis R. BRUCE et al., Defendants-Appellees.

No. 73-1168.

United States Court of Appeals, Tenth Circuit.

Argued and Submitted Aug. 14, 197

Decided Sept. 26, 1973.

Member of national nonprofit poration organized to combat discri nation, racism and other social probl affecting Indians in general and Na jos at certain Navajo boarding schoo particular and certain students at sc brought action seeking to have school replaced with adequate school cilities on reservation. The Un States District Court for the Distric Utah, Northern Division, Aldon J. derson, J., —— F.Supp. ——, dismi complaint, and plaintiffs appealed. Court of Appeals, Barrett, Cir Judge, held that District Court did have jurisdiction over action.

Affirmed.

1. Courts ⇐280.1

United States district courts courts of limited jurisdiction.

2. Courts ⇐280(2)

No presumptions of federal ju diction exist.

3. United States ⇐125(24)

Courts may not entertain unconsented suits which, though nominally against officers of the United States, are in reality against government itself.

4. Constitutional Law ⇐68(1)

Federal district courts are without jurisdiction when confronted with nonjusticiable political questions, such as determining status of Indian tribes.

5. Indians ⇐3, 6

Congress has exclusive plenary legislative authority over Indians and all of their tribal relations.

6. Statutes ⇐219(1)
Treaties ⇐7

Great deference should be afforded to interpretations by agency charged with duty of carrying out statutory mandates; credence should be particularly accorded those who are working with treaties.

7. Constitutional Law ⇐74

Courts cannot substitute their judgment for that of those working with Indians, empowered to exercise discretion.

8. Mandamus ⇐28

Court must not direct manner in which discretionary acts are to be performed nor may it direct or influence exercise of discretion in making that decision.

9. Constitutional Law ⇐74
United States ⇐125(28)

Federal court did not have jurisdiction over action wherein replacement of Navajo boarding school, which was operated by Bureau of Indian Affairs, with adequate school facilities on reservation was sought, in light of sovereign immunity of United States and in view of plenary legislative power of Congress over Indian affairs and discretionary authority delegated by Congress to those charged with carrying out statutory dictates relating to Indian affairs. Act March 17, 1949, 63 Stat. 14; Navajo Treaty of 1868, art. 6, 15 Stat. 667; U.S.C.A.Const. Amend. 5; Fed.Rules Civ. Proc. rule 8(a)(2), 28 U.S.C.A.

Richard L. Young, Native American Legal Defense & Education Fund, Inc., Albuquerque, N. M., for plaintiffs-appellants.

Robert L. Klarquist, Dept. of Justice, Washington, D. C. (George R. Hyde, Dept. of Justice, Washington, D. C., C. Nelson Day, U. S. Atty., H. Ralph Klemm, Asst. U. S. Atty., Wallace H. Johnson, Asst. Atty. Gen., Salt Lake City, Utah, on the brief), for defendants-appellees.

Before BARNES,* BREITENSTEIN and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

Plaintiffs below appeal from the dismissal of their amended complaint wherein they sought to close Intermountain School, a Navajo boarding school located in Brigham City, Utah, operated by the Bureau of Indian Affairs (BIA) of the Department of the Interior.

Appellant National Indian Youth Council (NIYC), Intermountain School Chapter, was organized on January 28, 1971. It is a member of a national non-profit corporation with chapters located at BIA boarding schools and other schools across the United States. NIYC was organized to combat by peaceful, non-violent means, the discrimination, racism, and other social problems affecting Indians in general and Navajos at Intermountain School in particular. Appellant Teddy K. Austin and the other individual appellants were students at Intermountain School at the time this action was brought. They are four of the "16-30" NIYC members at Intermountain School.

The individual defendants-appellees are officials and employees of the BIA, with the exception of E. A. Leopardi, who is an employee of the Public Health Service.

Intermountain School was created by Congress, Act of March 17, 1949, c. 22, 63 Stat. 14. The premises include what was formerly Bushnell General Hospital, a World War II military facility. The 1949 Act transferred the premises from the War Assets Administration to the Department of the Interior. Attendance at the school is predicated on a written application submitted by a student or guardian accompanied by the parents' consent. Approximately 1,500 Navajo students were enrolled at the school when this action was commenced. The school has been endorsed by the Navajo Tribal Educational Committee "as long as the need exists" for educating "retarded two or more grades" students at off-reservation federal schools.

The original complaint alleged that the operation of Intermountain School was in violation of the Navajo Treaty of 1868,[1] that it was racially segregated in violation of the Fifth Amendment, and that many of the practices and policies of the school were violative of appellants' constitutional rights. This complaint was dismissed with leave to amend. In its order dismissing, the trial court held that the suit was improper because of the plaintiffs' inability to escape the effects of the doctrine of sovereign immunity, their failure to exhaust available administrative remedies, and their failure to set forth allegations in "short and plain" statements

* Honorable Stanley N. Barnes, Senior Judge of the Ninth Circuit, sitting by designation.

1. Article VI of the Treaty provides:

In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

15 Stat. 667

as required by Rule 8(a)(2) of the Federal Rules of Civil Procedure.

The amended complaint presented seven causes of action. The first six were directed to the proposition that Intermountain School should be eliminated as a Navajo school and replaced with adequate school facilities on the reservation. The seventh was an attack on a "variety of school policies and practices which are illegal." Again the trial court dismissed, holding that the amended complaint did not overcome the effects of the doctrine of sovereign immunity and for failure to exhaust available administrative remedies. The trial court noted that the amended complaint was "for the most part, merely a restatement of the original complaint, fraught with the same errors and imprecision."

Appellants have set forth numerous allegations of error on appeal. We will consider only whether the trial court properly applied the doctrine of sovereign immunity in ordering dismissal of the amended complaint. We hold that the Court did not err. See National Indian Youth Council v. Bruce, — F. Supp. — (D.Utah 1973).

[1–3] United States District Courts are courts of limited jurisdiction. McCord v. Dixie Aviation Corporation, 450 F.2d 1129 (10th Cir. 1971). No presumptions of federal jurisdiction exist. Commercial Security Bank v. Walker Bank & Trust Co., 456 F.2d 1352 (10th Cir. 1972). Courts may not entertain unconsented suits which, though nominally against officers of the United States, are in reality against the Government itself. Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971).

The general rule is that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," Land v. Dollar, 330 U.S. 731, 738 [67 S.Ct. 1009, 1012, 91 L.Ed. 1209] (1947), or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act." Larson v. Domestic & Foreign Corp., *supra*, [337 U.S. 682] at 704 [69 S.Ct. 1457, 93 L.Ed. 1628]; Ex parte New York, 256 U.S. 490, 502 [41 S.Ct. 588, 65 L.Ed. 1057] (1921). Dugan v. Rank, *supra*, 372 U.S. at 620, 83 S.Ct. at 1006.

This action was clearly one against the United States, even though it was not sued in its sovereign capacity. The judgment sought would expend itself on the federal treasury. The United States did not consent to be sued. The trial court was without jurisdiction.

[4] District courts are also without jurisdiction when confronted with nonjusticiable political questions, such as determining the status of Indian tribes. Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Congress has exclusive plenary legislative authority over Indians and all of their tribal relations. Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903). This court has recognized the plenary power of Congress to control and manage the affairs of its Indian wards. Wolfe v. Phillips, 172 F.2d 481 (10th Cir. 1949), cert. denied 336 U.S. 968, 69 S.Ct. 941, 93 L.Ed. 1119 (1949); Taylor v. Tayrien, 51 F.2d 884 (10th Cir. 1931).

[5–9] The trial court's dismissal is further buttressed by the rule that great deference should be afforded to interpretations by the agency charged with the duty of carrying out statutory mandates. Udall, Secretary of the Interior v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); Garvey v. Freeman, 397 F.2d 600 (10th Cir. 1968). Credence should be particularly accorded those who are working with treaties. Kolovrat v. Oregon, 366 U.S. 187, 81 S.Ct. 922, 6 L.Ed.2d 218 (1961). Courts cannot substitute their judgment for that of those working with Indians, empowered to exercise discretion. Board of Com'rs of Pawnee County, Okl. v. United States, 139 F.2d 248 (10th Cir. 1943).

In no event should a court direct the manner in which discretionary acts are to be performed, nor may it direct or influence the exercise of discretion in making that decision. McQueary v. Laird, *supra*. Recognizing then, as we must, the lack of jurisdiction of the trial court in light of the sovereign immunity of the United States, the plenary legislative power of Congress over Indian affairs, and the discretionary authority delegated by Congress to those charged with carrying out statutory dictates relating to Indian affairs, we hold that the trial court did not err in dismissing the amended complaint.

Affirmed.

as required by Rule 8(a)(2) of the Federal Rules of Civil Procedure.

The amended complaint presented seven causes of action. The first six were directed to the proposition that Intermountain School should be eliminated as a Navajo school and replaced with adequate school facilities on the reservation. The seventh was an attack on a "variety of school policies and practices which are illegal." Again the trial court dismissed, holding that the amended complaint did not overcome the effects of the doctrine of sovereign immunity and for failure to exhaust available administrative remedies. The trial court noted that the amended complaint was "for the most part, merely a restatement of the original complaint, fraught with the same errors and imprecision."

Appellants have set forth numerous allegations of error on appeal. We will consider only whether the trial court properly applied the doctrine of sovereign immunity in ordering dismissal of the amended complaint. We hold that the Court did not err. See National Indian Youth Council v. Bruce, — F. Supp. — (D.Utah 1973).

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In no event should a court direct the manner in which discretionary acts are to be performed, nor may it direct or influence the exercise of discretion in making that decision. McQueary v. Laird, *supra*. Recognizing then, as we must, the lack of jurisdiction of the trial court in light of the sovereign immunity of the United States, the plenary legislative power of Congress over Indian affairs, and the discretionary authority delegated by Congress to those charged with carrying out statutory dictates relating to Indian affairs, we hold that the trial court did not err in dismissing the amended complaint.

Affirmed.

APPENDIX B

NATIONAL INDIAN YOUTH COUNCIL v. BRUCE

Cite as 366 F.Supp. 313 (1973)

NATIONAL INDIAN YOUTH COUNCIL et al., Plaintiffs,

v.

Louis R. BRUCE et al., Defendants.

No. NC 21-71.

United States District Court,
D. Utah, N. D.
Jan. 10, 1973.

Class action by Navajo Indians seeking court order directing government agents to close down off-reservation school and transfer the secondary education programs being conducted there for Navajo youth to a facility located on the reservation. On defendants' motion to dismiss, the District Court, Aldon J. Anderson, J., held that suit did not come within exception to doctrine of sovereign immunity on theory that government agents had violated the 1868 treaty; that plaintiffs' proper remedy was administrative under regulations promulgated by the Department of the Interior for appeal from actions of officials of the Bureau of Indian Affairs which violate a claimed right secured by the Constitution or any federal statute or treaty; that issue of proper location of the school was a nonjusticiable political question; and that complaint did not state a claim under statute prohibiting use of appropriated funds for education of Indian children in elementary and secondary education programs in sectarian schools.

Amended causes dismissed with prejudice; other claims dismissed without prejudice.

Judgment affirmed 485 F.2d 97.

1. United States ⇐125(3)

Suit against government is barred by the doctrine of sovereign immunity unless the government has expressly waived immunity by statute or plaintiffs allege facts which bring case within one of the exceptions to sovereign immunity.

2. United States ⇐125(24)

Doctrine of sovereign immunity prevents unconsented suit against the government unless the actions of government officials are beyond their statutory authority or, although acting within the scope of their statutory authority, that authority, or said officials' exercise thereof, is constitutionally void.

3. Treaties ⇐11

Courts will not ordinarily undertake to construe a treaty in a manner inconsistent with a subsequent federal statute.

4. Indians ⇐3

The plenary power of Congress over Indian tribes cannot be limited by treaties so as to prevent repeal or amendment by later statute.

5. Treaties ⇐7

The interpretation given treaties by the Executive merits important consideration.

6. Indians ⇐8

Statutes authorizing and establishing off-reservation schools, regulating the enlistment of students to attend such schools and prohibiting the use of government appropriations for the education of Indian children in sectarian schools off the reservation evidence an intent on part of Congress to provide off-reservation schooling for Indian youth under certain circumstances. 25 U.S.C.A. §§ 71, 278a, 286; Act March 17, 1949, 63 Stat. 14.

7. Indians ⇐8

Operation of off-reservation schools at which secondary education programs were being conducted for Navajo youths was within the scope of government agents' lawful discretion as circumscribed by the composite intent of Congress gleaned from terms of both the 1868 treaty and statutes. 25 U.S.C.A. §§ 71, 278a, 286; Act March 17, 1949, 63 Stat. 14.

8. Indians ⇐3

Court would not presume to question the judgment and intentions of Congress in entering into 1868 treaty

pertaining to education of reservation children or subsequent statutes enacted on the same subject. 25 U.S.C.A. §§ 71, 278a, 286; Act March 17, 1949, 63 Stat. 14.

9. United States ⇐125(32)

In absence of showing that government agents had exceeded the discretion or violated any duties outlined by 1868 treaty pertaining to education of reservation children and federal statutes touching upon the treaty, plaintiffs could not sue under exception to doctrine of sovereign immunity pertaining to actions of government officials beyond their statutory authority. 25 U.S.C.A. §§ 71, 278a, 286; Act March 17, 1949, 63 Stat. 14.

10. Indians ⇐4

Proper remedy for government officials' alleged violation of 1868 treaty pertaining to education of reservation children and statutes enacted on the same subject was administrative under regulations promulgated by the Department of the Interior for appeal from actions of officials of the Bureau of Indian Affairs which violate a claimed right secured by the Constitution or any federal statute or treaty. 25 U.S.C.A. §§ 71, 278a, 286; Act March 17, 1949, 63 Stat. 14.

11. Indians ⇐27(3)

Fact that government officials alleged that compliance with plaintiffs' demand that off-reservation school at which secondary education programs were being conducted for Navajo youth be relocated was beyond defendants' authority or prerogative did not show that administrative action would be futile or inadequate so as to permit plaintiffs to avoid the requirement to exhaust administrative remedies. 25 U.S.C.A. §§ 71, 278a, 286; Act March 17, 1949, 63 Stat. 14.

12. Constitutional Law ⇐70.1(7)

Congress has exclusive authority vis-a-vis the federal judiciary with respect to the status of Indians. U.S.C.A. Const. art. 1, § 8, cls. 1, 3, 11; art. 4, § 3.

13. Constitutional Law ⇐70.1(7)
Indians ⇐5

The manner in which education is provided for Indians involves the "status" of Indians as to which Congress has exclusive authority, and the separation of powers would preclude court from ordering removal of off-reservation school conducting secondary education programs for Navajo youths to the reservation. U.S.C.A.Const. art. 1, § 8, cls. 1, 3, 11; art. 4, § 3.

See publication Words and Phrases for other judicial constructions and definitions.

14. Constitutional Law ⇐68(1)

Issue of proper location of off-reservation school conducting secondary education programs for Navajo youth was a nonjusticiable political question. U.S.C.A.Const. art. 1, § 8; art. 4, § 3.

15. Indians ⇐8

Factual allegations bearing upon the quality of education at off-reservation school conducting secondary classes for Navajo youth, and as to the moral conduct of students there, did not equip court to render judgment whether the school should be moved by court order, a decision which would require an initial policy determination of a kind clearly for nonjudicial discretion and an expression of lack of the respect due coordinate branches of government. U.S.C.A.Const. art. 1, § 8; art. 4, § 3.

16. Constitutional Law ⇐72

Courts are not in the business of determining where federal schools are to be located, what classes should be taught, the appropriate nature and extent of student-counseling services to be provided or how, in any other respects, school administrators exercise their lawful discretion.

17. Indians ⇐8

Act transferring building from the War Assets Administration to the Secretary of Interior for use by Bureau of

Indian Affairs as a vocational school for Indian children and a center for housing and training adult Indians for off-reservation employment and placement intended to vest in the Secretary of the Interior wide latitude in administratively interpreting the accompanying, subordinate charge to use the building as a vocational school and does not preclude the establishment of a normal high school. Act March 17, 1949, 63 Stat. 14.

18. Indians ⇐8

Even if 1949 act transferring building from War Assets Administration to the Secretary of Interior for use by the Bureau of Indian Affairs as a vocational school for Indian children and center for housing and training adult Indians for off-reservation employment and placement was violated by government officials in operating a normal high school so as to permit plaintiffs to avoid the defense of sovereign immunity, such proof would not support relief in form of transfer of school to the reservation based on allegations of inferior education and detrimental moral effect. Act March 17, 1949, 63 Stat. 14.

19. Indians ⇐8

Allegations that government officials discouraged plaintiffs from the practice of either the traditional Navajo religion or the ceremonies of the native American Church while showing favoritism toward the Christian religion, even if proved, would not establish that off-reservation school at which secondary educational programs were being conducted for Navajo youth was a "sectarian school" within meaning of statute prohibiting appropriation of funds for education of the children in sectarian schools. 25 U.S.C.A. § 278a.

See publication Words and Phrases for other judicial constructions and definitions.

20. Indians ⇐8

By "sectarian school" in statute prohibiting appropriation of funds for education of Indian children in education programs in sectarian schools, Congress meant a school sponsored or supported, at least in part, by a religious denomination, or what is also commonly termed a "parochial school." 25 U.S.C.A. § 278a.

21. Indians ⇐27(3)

Claims that plaintiffs were aggrieved by school-sponsored religious or anti-religious practices at off-reservation school at which secondary education programs were being conducted for Navajo youth were classically suited, initially, to administrative rather than judicial relief. 25 U.S.C.A. § 278a.

22. Indians ⇐27(1)

Civil claim may be grounded on statute making it unlawful for any Indian agent or other government employee to seek to induce by improper means the parents or next of kin of any Indian to consent to the removal of any Indian child beyond the limits of any reservation. 25 U.S.C.A. § 286.

23. Indians ⇐27(5)

Where the class which the named plaintiffs purported to represent in seeking to close down off-reservation school and transfer the education programs being conducted there for Navajo youth to facility on the reservation consisted of Indian people between the ages of 13 and 23 years, and none of the named plaintiffs was, at the time the suit was filed, both a student at the school and of the age of majority, the minors had no standing to invoke statutes making it unlawful for any Indian agent or government employee to seek to induce by improper means the parents or next of kin of any Indian to consent to removal of any Indian child beyond the limits of any reservation, nor did any plaintiffs who had been emancipated from minority status have standing to sue under the statute. 25 U.S.C.A. § 286.

24. Courts ⇐282(3)

Although allegations of violation of Navajo Indians' right to freedom of religion and freedom of speech by virtue of their being required to attend an off-reservation school and by government

Indian Affairs as a vocational school for Indian children and a center for housing and training adult Indians for off-reservation employment and placement intended to vest in the Secretary of the Interior wide latitude in administratively interpreting the accompanying, subordinate charge to use the building as a vocational school and does not preclude the establishment of a normal high school. Act March 17, 1949, 63 Stat. 14.

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24. Courts ⇐282(3)

Although allegations of violation of Navajo Indians' right to freedom of religion and freedom of speech by virtue of their being required to attend an off-reservation school and by government

vajo Indians,[2] which provides for the education of Navajo children between the ages of six and sixteen. Plaintiffs have apparently reintroduced this cause of action as a means of moving the court for a rehearing of the issues presented therein.

After reconsideration the court concludes that the grounds stated for dismissal of this cause in the first instance apply with equal force in the present instance.

[1, 2] This is plainly a cause of action seeking a judgment that would ". . . expend itself on the public treasury or domain, or interfere with the public administration . . . or . . . restrain the Government from acting, or . . . compel it to act."[3] As such, it is a suit against the government and is barred by the doctrine of sovereign immunity unless 1) the government has expressly waived immunity by statute; or 2) plaintiffs allege facts which bring this case within one of the exceptions to sovereign immunity recognized by the Court in Larson v. Domestic & Foreign Corp.[4] According to *Larson*, the doctrine of sovereign immunity prevents unconsented suit against the government unless 1) the actions of government officials are beyond their statutory authority; or 2) although acting within the scope of their statutory authority, that authority, or said officials' exercise thereof, is constitutionally void.[5]

[3–7] No claim of waiver of sovereign immunity is made in the instant case. Plaintiffs apparently attempt, instead, to avail themselves of the first exception above by claiming, in effect, that by violating the 1868 Treaty defendants have exceeded their statutory authority and thus are precluded from invoking the doctrine in their defense. But, in defining the limits of defendants' discretion the court concludes that more must be looked to than the Treaty alone. The courts will not ordinarily undertake to construe a treaty in a manner inconsistent with a subsequent federal statute.[6] Furthermore, it has been long established that the plenary power of Congress over Indian tribes cannot be limited by treaties so as to prevent repeal or amendment by later statute.[7] To paraphrase Mr. Justice Holmes: words in the 1868 Treaty establishing reservation schools " . . . were addressed only to the tribe, and rested for their fulfillment on the good faith of the United States,—a good faith that would not be broken by a change (held) by Congress to be for the welfare of the Indians."[8] Likewise, the interpretation given treaties by the Executive merits important consideration, as explained by the United States Supreme Court in Kolovrat v. Oregon:[9]

2. 15 Stat. 667 (1868).

3. Dugan v. Rank, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963). *See also* Larson v. Domestic and Foreign Corp., 337 U.S. 682, 704, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); Land v. Dollar, 330 U.S. 731, 738, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947).

4. 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949).

5. *Id.* at 701–702, 69 S.Ct. 1457.

6. Whitney v. Robertson, 124 U.S. 190, 8 S.Ct. 456, 31 L.Ed. 386 (1888). *See also* Baker v. Carr, 369 U.S. 186, 212, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

7. Nicodemus v. Washington Water Power Co., 264 F.2d 614, 617 (9th Cir. 1959). *See also* Choate v. Trapp, 224 U.S. 665, 671, 32 S.Ct. 565, 56 L.Ed. 941 (1912); Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903); Thomas v. Gay, 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740 (1898); Sioux Tribe of Indians v. United States, 146 F.Supp. 229, 235–236 (Ct.Cl.1956). This rule is supported by the fact that until 1871 Congress dealt with the Indian tribes by treaty alone, whereas in 1871 Congress unilaterally changed its manner of dealing with the tribes from treaty to statute. Act of Mar. 3, 1871, ch. 120, § 1, Stat. 566 (codified at 25 U.S.C. § 71 [1964]). *See* Note, The Indian Bill of Rights and the Constitutional Status of Tribal Indians, 82 Harv.L. Rev. 1343, 1347 (1969).

8. Conley v. Ballinger, 216 U.S. 84, 91, 30 S.Ct. 224, 225, 54 L.Ed. 393 (1910). *See also* 2 Antieau, Modern Constitutional Law 405–25 (1969).

9. 366 U.S. 187, 81 S.Ct. 922, 6 L.Ed.2d 218 (1961).

While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.[10]

Plaintiffs themselves refer the court to federal statutes enacted subsequent to the 1868 Treaty which authorize and establish off-reservation schools,[11] regulate the enlistment of students to attend such schools[12] and prohibit the use of government appropriations for the education of Indian children in sectarian schools[13] off the reservation.[14] These statutes clearly evidence an intent on the part of Congress to provide off-reservation schooling for Indian youth under certain circumstances and clarify or alter the Treaty in that respect, depending upon one's point of view. (In the present context it is irrelevant whether the Treaty has been altered or clarified.) They are operational statutes and they serve to chart and delimit the discretion of the instant defendants in a more meaningful sense than does the Treaty alone. The present operation of Intermountain is plainly within the scope of defendants' lawful discretion as circumscribed by the composite intent of Congress gleaned from the terms of both the Treaty and said statutes. Naturally, the present operation of Intermountain is also a reflection of the meaning given to the Treaty by the Department of Interior, the department of government particularly charged with its enforcement, and that fact is worthy of considerable weight in this proceeding.

Even if the Treaty were the sole source of defendants' discretion, there would be no basis for a conclusion that defendants have exceeded their discretion. The terms of the Treaty, which require that teachers and schools be provided on the reservation for children between the ages of six and sixteen, do not state, or even necessarily imply, a prohibition against the establishment of additional off-reservation schools, especially schools primarily for children over the age of fifteen. The thrust of Article VI seems to have been simply to provide education for Indian youth, rather than to prescribe where and in what particular manner that education should be provided under the varying and unforeseeable circumstances of the century which has passed since its signing. Furthermore, the thrust of the Treaty as a whole appears to have been, first, to provide land for the Indians and, second, to provide inducements for them to remain on the land and become a settled, agrarian community, as opposed to a community of nomadic hunters. In this context education for Indian children may be construed as an added inducement to make this change. This thrust removes Article VI even further from the construction which plaintiffs seek to place upon it.

[8, 9] This court will not presume to question the judgment and intentions of Congress in entering into the 1868 Treaty or subsequent statutes enacted on the same subject. Therefore, unless plaintiffs are prepared to demonstrate that defendants have exceeded the discretion or violated any duties outlined by the Treaty and the whole range of federal statutes which touch upon the Treaty, they may not sue under the first exception to the doctrine of sovereign immunity referred to by the Court in *Larson*. The allegations of the claim grounded in the Treaty do not point to

10. *Id.* at 194, 81 S.Ct. at 926. *See also* Factor v. Laubenheimer, 290 U.S. 276, 294–95 (1933); 2 Antieau, *supra* note 8 at 407–08.

11. Act of Mar. 17, 1949, ch. 22, 63 Stat. 14.

12. 25 U.S.C.A. § 286 (1963).

13. 25 U.S.C.A. § 278a (1963).

14. The interpretation of this provision as applying to off-reservation schools is plaintiffs' own. The statute itself says nothing with respect to the location of the schools to which it pertains. The context in which the statutory language occurs in plaintiffs' complaint compels the conclusion that plaintiffs interpret the statute to refer to off-reservation schools. The court is in agreement with this interpretation.

actions by the defendants which conflict with their valid authority, as defined by the Treaty and subsequent statutes providing for off-reservation schools. The most that might be claimed is that by operating off-reservation schools for Navajo Indians defendants are exercising their lawful discretion in a manner which conflicts with these plaintiffs' concept of how such discretion should be exercised. Such a claim is beyond the pale of this court.

> In no event . . . may the court direct the manner in which discretionary acts are to be performed nor may it direct or influence the exercise of discretion in making that decision.[15]

This court concludes, therefore, that the following language of the United States Supreme Court in Larson v. Domestic & Foreign Commerce Corp.[16] is dispositive of plaintiffs' contentions in regard to sovereign immunity:

> We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign . . .. [T]he action itself cannot be enjoined or directed, since it is also the action of the sovereign.[17]

As a result, the doctrine of sovereign immunity is a bar to suit and this court has no jurisdiction to hear plaintiffs' claim concerning the Treaty.

[10, 11] Regardless of the applicability of sovereign immunity, plaintiffs' proper remedy on the first cause is administrative under regulations promulgated by the Department of the Interior[18] for appeal from the actions of officials of the Bureau of Indian Affairs which violate a claimed right secured by the United States Constitution or any federal statute or treaty. Plaintiffs attempt to circumvent the administrative process by pointing to a statement in defendants' Memorandum in Support of Motion to Dismiss to the effect that compliance with plaintiffs' demand that the Brigham City school be relocated is beyond defendants' authority or prerogative. Plaintiffs claim that this statement shows that administrative action would be futile or inadequate. That claim is without merit. Plaintiffs suggest no other evidence that they would not receive a fair and adequate hearing of the issues involved upon proper presentation of these claims to the appropriate administrative body or that there exists a threat of immediate, irreparable injury. The statement in defendants' brief, alone, does not amount to a sufficient showing of inadequacy. For this reason not only must the first cause fail, but each subsequent reallegation of defendants' statement as a means of avoiding the requirement to exhaust administrative remedies must also fail.[19]

Even if the statements in defendants' memorandum to which plaintiffs refer could be construed as a predetermination of the outcome of administrative action justifying circumvention of the administrative process, there is a further, overarching limitation on judicial action which may, in any event, render this court powerless to adjudicate plaintiffs' Treaty claim or any claim upon which removal of the school is sought. The administration of an Indian school system may be identified as a function

15. McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971).

16. 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949).

17. *Id.* at 695, 69 S.Ct. at 1464.

18. 25 C.F.R. § 2.1 et seq. (1972) (*See esp.* § 2.2).

19. It should be noted here that the instant statement in defendants' memorandum is relied upon with respect to each of the plaintiffs' seven causes of action as evidence of the inadequacy of administrative relief. By its own terms, however, the statement applies only to the prayer to remove the school. The statement sheds no light whatsoever on the prospects for administrative relief based upon other claims contained in the last six causes of action upon which declaratory judgment, damages, or other injunctive relief is sought and provides no reason to circumvent the administrative process in connection with such other claims.

which evokes the constitutional doctrine of the separation of powers. It is in the end a subject bearing upon the status of the Indian tribes, a subject which has been committed to the power of Congress. It was early determined that tribal Indians retained their character as a distinct political community,[20] and state jurisdiction over this entity was preempted by Congress' exclusive authority based on its power to declare war,[21] to implement treaties,[22] to regulate the disposition of federal lands,[23] and to regulate commerce with the Indian tribes.[24] Used in this sense, "exclusive" has come to mean Congress' exclusive authority vis a vis the state governments. This authority has been interpreted as paramount and plenary power to control and manage the affairs of the Indian people.[25]

[12, 13] Congress has also exclusive authority vis a vis the federal judiciary with respect to the *status* of Indians.[26] The status of Indians, therefore, has been considered a nonjusticiable political question.[27] As used by the United States Supreme Court in cases involving the status of Indians the term "status" appears to mean the nature and description of Indian polities in relation to the government of the United States and the governments of the several states.[28] It appears to the court that the manner in which education is provided for the Indians is encompassed within the meaning of the term "status" and that, therefore, the manner of providing education is a matter committed to the exclusive authority of Congress. By way of its exclusive constitutionally-derived power over the status of Indian tribes Congress has established a guardian-ward relationship between the federal government and the Indian tribes. In its role as creator of the wardship status of the Indians Congress has undertaken to provide education for them and has made the initial policy determination that at least some of the schools established for the Indians shall be located off the reservation and that consenting parents may cause their children to attend such schools. The establishment of off-reservation schools is an appropriate means by which the federal government protects its guardianship and is a considered program undertaken in discharge of the obligations of that guardianship. Such a program should not be impaired by interference from the judiciary. It appears, in other words, that the establishment of off-reservation Indian schools was an exercise by Congress of its exclusive power to deal with the status of Indian tribes. Therefore, insofar as individual Indians, or classes of Indians, might be permitted to invoke the power of this court to remove an off-reservation school to the reservation, the guardian-ward relationship between the United States and the Navajo Indians would tend to be extinguished or

20. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557, 559, 8 L.Ed. 483 (1832) (Marshall, C. J.).

21. U.S.Const. art. I, § 8, cl. 11.

22. U.S.Const. art. I, § 8, cl. 1.

23. U.S.Const. art. IV, § 3.

24. U.S.Const. art. I, § 8, cl. 3. *See also* Note, The Indian Bill of Rights and the Constitutional Status of Tribal Indians, *supra* note 7 at 1347.

25. *See, e. g.*, Colliflower v. Garland, 342 F.2d 369, 377–378 (9th Cir. 1965); Wolfe v. Phillips, 172 F.2d 481, 485 (10th Cir. 1949), cert. denied 336 U.S. 968, 69 S.Ct. 941, 93 L.Ed. 1119.

26. *See*, Baker v. Carr, 369 U.S. 186, 215–216, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); United States v. Sandoval, 231 U.S. 28, 45–46, 34 S.Ct. 1, 58 L.Ed. 107 (1913); Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903); United States v. Holliday, 70 U.S. (3 Wall.) 407, 419, 18 L. Ed. 182 (1865).

27. *See* cases cited note 26 *supra*. In Lone Wolf v. Hitchcock, the Court stated the following, 187 U.S. at 565, 23 S.Ct. at 221:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.

28. *See* cases cited note 26 *supra*.

abandoned [29] and this court would contravene a policy established by Congress on a subject committed to the exclusive authority of Congress by the Constitution of the United States and thus interfere with that authority in violation of the doctrine of the separation of powers. The fact that an order of this court removing the Intermountain School to the reservation would appear to involve the status of Indians and, therefore, the separation of powers leads this court to conclude that the Treaty claim presents a nonjusticiable political question and that even without the other forceful reasons which exist for refusing to remove the school to the reservation, the court should refuse to take such action.

That the issue of the proper location of this school is a political question is made more clear by an analysis of the issue in terms of the test announced in Baker v. Carr [30] for determining whether an issue is a nonjusticiable political question.

> It is apparent * * that several formulations which vary slightly according to the settings in which questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[31]

The Supreme Court stated in that case that unless one of the above formulations was inextricable from the case, there should not be a dismissal on the ground that a political question was present.

[14–16] It is this court's opinion that all of these formulations are inextricable from the case at bar. First, a textual commitment of the issue of the status of Indians is demonstrated by section 8 of article I of the Constitution, which commits to the Congress power over commerce with the Indian tribes, the war power and the power to implement treaties and section 3 of article IV, which commits to Congress the power to regulate the disposition of federal lands, which together form a composite power over intercourse with the Indian tribes which is paramount, plenary and exclusive. Second, this court has not been furnished by the plaintiffs with any judicially discoverable and manageable standards by which it may be determined whether or not the Intermountain School should be moved by order of the court. Plaintiffs' factual allegations bearing upon the quality of education at the school and the moral conduct of students there do not equip the court to render such a judgment or aid in any material degree in plaintiffs' effort to

29. In Board of County Commissioners v. Seber, 318 U.S. 705, 718, 63 S.Ct. 920, 87 L.Ed. 1094 (1943), the Court held that it rests with Congress to determine when the guardianship relation shall cease. In another case the Court said that ". . . it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress." In re Heff, 197 U.S. 488, 499, 25 S.Ct. 506, 508, 49 L.Ed. 848 (1905), overruled on other grounds, United States v. Nice, 241 U.S. 591, 36 S.Ct. 696, 60 L.Ed. 1192 (1916).

30. 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) (holding that the issue of state legislative apportionment is justiciable).

31. *Id.* at 217, 82 S.Ct. at 710. *See also* Coleman v. Miller, 307 U.S. 433, 454–455, 59 S.Ct. 972, 83 L.Ed. 1385 (1939).

establish a case or controversy. Third, it is clear that the decision to establish off-reservation schooling for Indians is a policy decision which was made at least twenty years ago by the political arm of the government. Therefore, the decision by a court of law to transplant an off-reservation school would both require an initial policy determination of a kind clearly for nonjudicial discretion and an expression of lack of the respect due coordinate branches of government. Fourth, embarrassment from the stand repeatedly taken by the Executive would certainly ensue. The courts are not in the business of determining, for example, where federal schools are to be located, what classes should be taught, the appropriate nature and extent of student counseling services to be provided or how, in any other respect, school administrators exercise their lawful discretion. To do so would be to disparage and embarrass a coordinate branch of government. There are no questions presented in the amended first cause of action which rise to the level of a bona fide controversy as to whether some action, denominated "political" or otherwise, exceeds constitutional authority.[32]

For the reasons recited, plaintiffs' claim based on the Treaty of 1868 is dismissed with prejudice.

II

Plaintiffs next assert that defendants have exceeded the authority of an act of Congress. The enactment in question provided for the transfer of the building which now houses the Intermountain School from the War Assets Administration, which had used the building as a hospital, to the Secretary of the Interior.[33] The Act stated, in addition, that the building was transferred

> "for use by the Bureau of Indian Affairs as a vocational school for Indian children and a center for housing and training adult Indians for off-reservation employment and placement."

Plaintiffs' claim is apparently founded upon an allegation that the school is not being used as a vocational school but, instead, is being used as a normal high school.

[17] First, insofar as the facts alleged in this cause of action may establish that education at Intermountain is inferior in some respects, the cause of action must fail as a precise repetition of the same allegations presented in the amended first cause of action for reasons stated above. Second, this was an act providing principally for the transfer of a building to the Secretary of the Interior for use as a school for Indians. It was not an act principally concerned with what was to be done with the school by its new proprietor. The allegation that Congress "obviously" did not intend that a normal high school be established at Intermountain grossly begs the question. It must clearly appear from the allegations of the complaint that the intentions of Congress have been exceeded by the defendants.[34] This court concludes that Congress intended to vest in the Secretary of the Interior wide latitude in administratively interpreting the accompanying, subordinate charge to use the building as a vocational school. That latitude would appear to encompass the decision to use the building as it is presently used. Third, plaintiffs do not allege facts which support their claim. They make no attempt in their allegations, for example, to define and distinguish high school and vocational school, which must be done if plaintiffs may hope to recover on a claim which is based upon an interpretation of the statute which excludes high schools from its coverage. Nor are there allegations which would support a conclusion that defendants are operating a normal high school. In the absence of

32. Baker v. Carr, *supra* note 30, 369 U.S. at 217, 82 S.Ct. 691.

33. Act of Mar. 17, 1949, ch. 22, 63 Stat. 14.

34. *Cf.* Aetna Insurance Co. v. Hyde, 275 U.S. 440, 447, 48 S.Ct. 174, 72 L.Ed. 357 (1928); 2A Moore's Federal Practice ¶ 8.13, at 1712 (2d ed. 1968).

such allegations, the court may conclude at this point in the litigation that even if the statute has present force, its terms do not preclude the establishment of a normal high school at Intermountain.

Finally, it is not clear what relief is sought. From the terms of certain of the allegations of the second cause of action it appears that plaintiffs wish to enjoin defendants only from operating anything but a vocational school. Such a result, of course, would conflict with the premise urged in support of the first cause of action; namely that off-reservation schools for Indian youth are undesirable. Moreover, plaintiffs' prayer for relief does not seek to enjoin defendants from operating anything but a vocational school at the Brigham City site. The prayer seeks, instead, outright transfer of the school from Brigham City to the reservation. This relief is supported by certain other allegations of the second cause which have to do with inferior education and immorality at Intermountain. There is a conflict, then, between the relief which the vocational school allegations point toward and the relief actually prayed for. The two types of relief are, in fact, philosophically incompatible.

[18] It appears that plaintiffs' allegations concerning the 1949 Act are intended as a device to avoid the defense of sovereign immunity. However, there appears to be no legally cognizable relationship between this device and the allegations of the second cause with respect to which immunity must be avoided if plaintiffs are to succeed on this cause; that is, the allegations of inferior education and detrimental moral effect, which apparently are the allegations relied upon in support of the prayer to move the school. Rather than describing the intent of Congress in using the term "vocational school," alleging wherein the Intermountain School is not a vocational school, and seeking as relief an injunction against operation of the school as anything other than a vocational school, plaintiffs proceed to allege that Intermountain provides an inferior education and has a detrimental effect upon the morals of its students. Even if it could be proved that defendants have exceeded their authority under the statute by operating a normal high school at Intermountain, no relief is sought based directly thereon and the resultant exemption from sovereign immunity would in no wise benefit the allegations of inferior education and detrimental moral effect or the transfer of the school to the reservation, which is the relief sought on the basis of the latter allegations. The amended second cause of action must fail, therefore, because Congress did not purport to restrict use of the school within narrow limits which would preclude its present use; because plaintiffs have, therefore, failed to allege wherein defendants have exceeded their authority under the statute; and because adequate allegations in that regard would provide no legal support and have no legal relationship to the other claims of the second cause or to the relief which plaintiffs apparently seek by that cause.

III

[19, 20] Plaintiffs next claim that defendants are funding the Intermountain School in violation of an act of Congress which provides as follows:

> Funds appropriated on or after March 30, 1968, to the Secretary of the Interior for the education of Indian children shall not be used for the education of Indian children in elementary and secondary education programs in sectarian schools . . . . .[35]

In support of this claim plaintiffs allege the following:

> [D]efendants . . . discourage plaintiffs . . . from practicing either the traditional Navajo religion or the ceremonies of the Native American Church, while on the other hand

35. 25 U.S.C.A. § 278a (1963).

> the defendants show favoritism toward the Christian religion by such obvious means as an official Christmas message . . . which . . . bore an illustration of a Navajo man and a Navajo woman . . . in a simulation of the Christian nativity scene . . . . [D]efendants . . . have further shown disrespect to traditional Navajo religious beliefs by failing to observe Navajo customs honoring the dead . . . .

However true these allegations may be, it is manifestly clear that they do not state a claim under the statute. It would not be possible, in the court's judgment, to introduce evidence within the framework of plaintiffs' allegations which would sustain a finding that defendants are operating a sectarian school. Although the alleged practices referred to by plaintiffs may relate to religion, they do not constitute an adequate allegation that Intermountain School is a sectarian school. It appears to the court that by "sectarian school" Congress meant a school sponsored or supported, at least in part, by a religious denomination, or what is also commonly termed a "parochial school." Plaintiffs' allegations are insufficient to state a claim that Intermountain is such a school. This cause of action must, therefore, be dismissed. As Judge Wisdom observed in Hoshman v. Esso Standard Oil Co.,[36] ". . . when the facts, alleged or assumed within the framework of the complaint, show that the claim is without merit there is no need to go to trial."[37]

[21] Insofar as plaintiffs are aggrieved by school-sponsored religious or anti-religious practices, they have, of course, claims classically suited, initially, to administrative relief. Plaintiffs having failed to make the necessary strong showing that proper presentation of these claims before the appropriate administrative bodies would be an inadequate remedy or would not result in a fair hearing, said cause of action is dismissed with prejudice.

IV

Plaintiffs make the further claim that defendants have contravened 25 U.S.C. § 286, part of which provides the following:

> [I]t shall be unlawful for any Indian agent or other employee of the Government to induce, or seek to induce, by withholding rations or by other improper means, the parents or next of kin of any Indian to consent to the removal of any Indian child beyond the limits of any reservation.

[22] It is not clear whether this statute is criminal in nature. No penalty is attached. On the basis of a court decision in a case brought upon a precursor of the present statute, however, it appears that a civil claim may properly be grounded in that statute.[38]

[23] The class which the named plaintiffs purport to represent allegedly consists of Indian young people between the age of 13 and 23 years of age. It appears that none of the named plaintiffs was, at the time this suit was filed, both a student at defendants' school and of the age of majority. It appears, therefore, that said minors have no standing to invoke § 286. They are the legal wards of their parents and subject to the compulsion of their parents to attend defendants' school. The statute speaks only to the manner in which parental consent is obtained for the placement of children at the school. If said consent has been obtained by improper means, it is the parents, rather than the children, who have a cause of action un-

36. 263 F.2d 499 (5th Cir. 1959).

37. *Id.* at 502.

38. In re Lelah-puc-ka-chee, 98 F. 429 (N.D.Iowa 1899). Petitioner in that case, an Indian girl, sought a writ of habeas corpus on the ground that she was unlawfully restrained of her liberty by being compelled to remain at an off-reservation Indian training school in violation of the statute. Act of Mar. 2, 1895, ch. 188, Art. VIII, 28 Stat. 906. The court countenanced the action, but denied the writ.

der the statute. No parents are parties to this action. Minor plaintiffs may not complain to the courts of their parents' decision to consent to their enrollment at the school. Nor may they complain that their parents compel them to attend.

The same reasoning applies to an extent with respect to any plaintiffs who may have reached the age of majority or be otherwise emancipated from minority status. Such plaintiffs may not invoke the present provision. Only their parents or those standing in the same legal relation to them as their parents may do so. However, since any such plaintiffs may be deemed emancipated from parental control, they may not be enrolled and required to attend without their own consent. No claim is made in the present complaint alleging that defendants have compelled any such plaintiff to attend the school against his own will. The court holds, therefore, that neither the named plaintiffs, nor any members of the class they purport to represent, have standing to sue under the instant statute. This conclusion is fully borne out by the following language from the opinion of the court in *In re Lelah-puc-ka-chee*,[39] apparently the only case heretofore decided involving the instant statute or a prior form thereof:

> The conclusion reached upon the questions submitted to the court is that the respondents, as the agent and school superintendent at the Tama county reservation, cannot by force or compulsion take the Indian children from the reservation proper, and keep them at the Indian training school, without the consent of the parents, or those who may stand in that relation to them; that, if Lelah-puc-ka-chee has in fact been married to Ta-ta-pi-cha according to the recognized tribal custom and manner, that fact emancipates her from parental control, and, if she wishes to leave the school, she cannot be lawfully prevented from so doing, but if she, although married, wishes to continue in attendance at the school, she has the right so to do; that if she is not in fact married to Ta-ta-pi-cha, and her parents desire to have her remain in the school, she being less than 18 years of age, the respondents have the right to require her attandance, but, if her attendance can only be secured by compulsion, that compulsion must be exercised by the parents . . . .[40]

Beyond the problems referred to in the discussion above, the court believes that the grievances cited in plaintiffs' fourth cause of action are best suited to presentation in the administrative process for a factual inquiry. No showing having been made that plaintiffs' claims have been ruled on administratively or that administrative remedies are not available or would be inadequate and, furthermore, it appearing to the court that in the absence of standing there is no legal basis upon which plaintiffs may recover in their amended fourth cause of action, the court concludes that plaintiffs' amended fourth cause of action should be dismissed with prejudice.

V

[24] As a fifth cause of action in their amended complaint plaintiffs allege the violation of their First Amendment right to freedom of religion and freedom of speech by virtue of their being required to attend an off-reservation school. As a basis for this claim plaintiffs allege, for example, defendants' refusal to permit the use of peyote by Intermountain students in religious ceremonies and the dissemination by defendants of a Christmas card bearing an illustration of a Navajo man and woman holding an infant in alleged simulation of the Christian nativity scene. Although the allegations of this cause of action may entitle plaintiffs to administrative relief, it is the conclusion of this court that plaintiffs' constitutional challenge to the matters complained of is so

39. In re Lelah-puc-ka-chee, 98 F. 429 (N.D. Iowa 1899).

40. *Id.* at 436-437.

lacking in substance that it affords no substantial basis for a claim of federal jurisdiction under 28 U.S.C.A. § 1331(a), as a civil action which arises under the Constitution of the United States.[41] Plaintiffs' fifth cause of action should be dismissed.

VI

[25] Plaintiffs' amended sixth cause of action alleges a violation of Fifth Amendment rights. As the basis for said claim plaintiffs allege that they have been deprived of a property right in the nature of a secondary education which will enable them to "function normally in the dominant white society if plaintiffs should choose or be compelled to subsist in that society." Aside from whether a property right of sufficient consequence to warrant the protection of the Fifth Amendment has been defined by the vague terms of plaintiffs' complaint, plaintiffs have again failed to demonstrate, to any degree, wherein the action which they request this court to take, that is, removal of the school to the reservation, would remedy the wrongs alleged in this cause of action.

Furthermore, plaintiffs again allege that defendants have denied parents of Indian children the "liberty" to bring up their children and participate meaningfully in their education. Yet no parent is among the plaintiffs or the class they claim to represent.

.Paragraph 65(c) of plaintiffs' complaint also contains wholly frivolous claims which have apparently been included for some emotional effect but which have no place in a pleading in a legal action.

The case of Bolling v. Sharpe,[42] referred to by plaintiffs in support of their sixth cause of action, is inapposite. *Bolling* was a school segregation case. In the present case plaintiffs complain of segregation at Intermountain, but argue for segregation on the reservation. In other words, plaintiffs do not seek desegregated schooling. In fact, the schooling provided at Intermountain, which is in the midst of the white community, would appear to be less segregated than the reservation schooling plaintiffs request. Plaintiffs' sixth cause of action is accordingly dismissed.

VII

Finally, plaintiffs complain of certain policies and practices allegedly adhered to by the defendants in the operation of the Intermountain School. With the exception of certain additional factual allegations, this cause of action is a precise restatement of the third cause of action contained in the original complaint. The original third cause of action was dismissed without prejudice for failure to state allegations sufficient to allow relief. The court ruled that plaintiffs' allegations did not "identify the person damaged, the extent of such damage, nor the person responsible for the alleged damage."[43] Most of the amended allegations suffer from the same failings. Six principal defects can be identified, at least one of which defeats each of plaintiffs' claims set forth in the amended seventh cause of action.

[26] The first deficiency is the one cited in the court's first order and referred to above. Paragraphs 75, 76, 77, 79, 80 and 81 suffer from this deficiency with respect to the claim of monetary damages. Each of these paragraphs fails to specify at least one of the following in that respect: the person damaged, the extent of damage, and the person responsible for the damage. Each said paragraph thus fails to state a damage claim upon which relief can be granted. Second, Paragraphs 75, 76, 77 and 81 also fail to allege specific instances of misconduct by the defendants and/or fail to relate the claims con-

41. *Cf.* Groundhog v. Keeler, 442 F.2d 674, 678 (10th Cir. 1971).

42. 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

43. National Indian Youth Council v. Bruce, Civil No. 21-71 (D.Utah, Mar. 13, 1972).

tained therein to persons who are members of the class purportedly represented by the named plaintiffs and are thus insufficient to state a claim of illegal policy upon which relief can be granted. As a third deficiency, all paragraphs, together with plaintiffs' affidavits and argument offered in support thereof, fail to make a prima facie showing of the coordinate elements of probable right and probable danger required for temporary or preliminary injunctive relief.[44] Each said paragraph thus fails to state a claim for injunctive relief upon which relief can be granted. A fourth deficiency is the failure to seek administrative relief with respect to allegedly unconstitutional policies adopted by defendants. Paragraphs 75, 76, 77, 78, 79, 80, 81, 82, 83 and 84 suffer from this deficiency. Each of the policies complained of in these paragraphs requires the kind of factual determination for which administrative relief has been designed. These policies, if they do exist, have been implemented in the exercise of administrative discretion and are first subject to objection and review within the Department of Interior. Plaintiffs have made no claim that their complaints have been registered with the Department according to established procedure or that doing so would not result in appropriate and adequate relief. Indeed, plaintiffs acknowledged at the hearing before this court on the instant motion that certain policies and practices complained of in the original complaint were not included in the amended complaint for the reason that administrative action had been taken since the filing of the original complaint to change and improve those policies and practices. In the absence of contrary indications this court must assume that upon proper administrative application the same result would obtain with respect to any meritorious claims contained in the amended seventh cause of action. The fifth deficiency is the failure of paragraphs 78, 79, 80, 83 and 84 to disclose wherein defendants' failure or refusal to act, as alleged in said paragraphs, consitutes any denial of rights guaranteed by the First, Fifth and Ninth Amendments of the Constitution of the United States or by the statutory provisions cited by plaintiffs in said paragraphs. Paragraph 80, for example, complains that defendants refused to arrange and pay for Intermountain students to travel to their homes for Christmas without identifying any legally enforceable duty or obligation which defendants violated by such refusal. Sixth, the statements setting forth the seventh cause of action fail to comply with Rule 8(a)(2), Fed. R.Civ.P. which requires that a statement of claim be "short" and "plain," and Rule 8(e)(1), which requires that each averment must be "simple, concise and direct." [45] The possibility remains that individual plaintiffs might still state a proper civil rights claim for damages or for injunctive relief which would facilitate jurisdiction in this court notwithstanding the deficiencies discussed above.

ORDER

Plaintiffs' amended causes of action one through six are dismissed with prejudice. The claims set forth in paragraphs 75–84 of plaintiffs' amended complaint are dismissed without prejudice to the filing of a proper federal claim which is sufficient and not subject to the deficiencies discussed in the court's opinion.

44. *See* Crowther v. Seaborg, 415 F.2d 437 at 439 (10th Cir. 1969), where the court stated the following:

> In hearings upon motions for temporary or preliminary injunctive relief, the burden is upon the one requesting such relief to make a prima facie case showing a reasonable probability that he will ultimately be entitled to the relief sought. The applicant has the additional burden of showing a right to the specific relief sought because of irreparable injury that will result if the injunction is not granted. There must exist a probable right and a probable danger.

See also 7 Moore's Federal Practice ¶ 65.04[1] (2d ed. 1972).

45. 2A Moore's Federal Practice ¶ 8.13, at 1683–1712 (2d ed. 1968).

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1003

NATIONAL INDIAN YOUTH COUNCIL, ET AL., PETITIONERS

v.

LOUIS R. BRUCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

1. This suit was brought in the United States District Court for the District of Utah by the National Indian Youth Council and several students at the Intermountain School at Brigham City, Utah, to require the Secretary of the Interior and others to close the Intermountain School, and for monetary damages. The school is operated by the Bureau of Indian Affairs outside the Navajo Reservation and has been used primarily as a boarding secondary school for Navajo students. The complaint and amended complaint, which range over a variety of administrative problems, primarily allege that the operation of the school is in violation of the Navajo Treaty of 1868, 15 Stat. 667, which requires the government to provide schools within the Reservation, and that the operation of the school violates the constitutional rights of the students—especially their freedom of religion.

The district court in a thorough opinion (Pet. App. B, 1-24), on which we primarily rely, considered the various allegations and dismissed the complaint on the grounds of sovereign immunity, failure to exhaust available administrative remedies, and failure to express the claimed civil rights violations with particularity (Pet. App. B). The court's dismissal was without prejudice to filing a more specific future complaint on the various civil rights issues raised (Pet. App. B, 24). A unanimous panel of the court of appeals affirmed in a written opinion (Pet. App. A, 1-7). Further review is not warranted.

2. Apart from the issues of sovereign immunity, this case was properly dismissed for failure to exhaust, or utilize at all, available administrative remedies. Although full administrative procedures are available in the Department of the Interior for correction of action of officials of the Bureau of Indian Affairs, 25 C.F.R. 2.2, it is uncontested that petitioners have made no attempt to invoke these remedies. Hence, the district court properly dismissed the complaint for failure to exhaust administrative remedies. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51; *McGee* v. *United States,* 402 U.S. 479, 484. See also *Christian* v. *New York State Department of Labor,* No. 72-5704, decided January 21, 1974. Moreover, petitioners are not entitled to damages payable out of the individual assets of the defendants for an alleged failure to provide an adequate education. See *Barr* v. *Matteo,* 360 U.S. 564; *Gregoire* v. *Biddle,* 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949; 3 Davis, *Administrative Law Treatise* (1958), Sec. 26.01, pp. 506-513. To the extent that petitioners seek such damages for alleged violations of civil rights, those allegations should be expressed with particularity, and the courts below have not precluded such a claim.

3. Many of the issues raised by petitioners have now become moot, as we are informed by the Department of the Interior that an administrative decision has already been made to phase out Intermountain School as a secondary boarding school for the exclusive use of Navajo children over a three-year period. In furtherance of that decision the ninth grade class was eliminated this school year. Presently under consideration are proposals to change the school into a regional secondary boarding school or a vocational school for older students. The Department also informs us that there are now sufficient on-reservation classrooms for all Navajo children.

CONCLUSION

For the foregoing reasons, the petition for a writ ofdenied.

ROBERT H. BORK,
Solicitor General.

WALLACE H. JOHNSON,
Assistant Attorney General.

GEORGE R. HYDE,
ROBERT L. KLARQUIST,
Attorneys.

MAY 1974.

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MICHAEL RODAK, JR., CLERK

MISC. NO. 73-1003

In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL INDIAN YOUTH COUNCIL, INTER-MOUNTAIN INDIAN SCHOOL CHAPTER, an unincorporated association, TEDDY K. AUSTIN, MARGARET DE JOLIE, LEE LUKE BEGAY, and ELSIE JIMMIE,

Plaintiffs-Petitioners,

-vs-

LOUIS R. BRUCE, JAMES HAWKINS, STANLEY SPEAKS, BARBARA EARL, SHERMAN L. NAY, MRS. WAMOTH TANNER, DIXON SMITH, E.A. LEOPARDI, JERRY JAEGER, JOHN CROW, WILMA VICTOR, and ROGERS C.B. MORTON,

Defendants-Respondents.

PETITION FOR REHEARING OF SUPREME COURT'S ORDER DENYING CERTIORARI TO THE TENTH CIRCUIT

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PETITION FOR REHEARING OF SUPREME COURT'S ORDER DENYING CERTIORARI TO THE TENTH CIRCUIT

Pursuant to Rule 58(2) of this Court, petitioners ask that the Court reconsider its Order dated May 28, 1974, denying the petition for a writ of certiorari herein. This petition for rehearing is based upon the grounds of intervening circumstances of substantial effect, and upon other substantial grounds available to petitioner although not previously presented, within the meaning of Rule 58(2).

A. Intervening Circumstances.

On June 12, 1974, the Tenth Circuit decided **Tewa Tesuque v. Morton,** a true copy of which decision is attached hereto as Appendix A. Citing its own decision in the instant case as authority, the Tenth Circuit in **Tewa Tesuque** held that the doctrine of sovereign immunity bars an equitable suit for prospective injunctive relief against named federal officials. In so holding, the Tenth Circuit again deliberately ignored or refused to accept as verities several specific, well pleaded allegations that the defendant federal officials had acted beyond and contrary to their statutory authority and in an unconstitutional manner. Counsel for petitioners here are also counsel for the plaintiffs in **Tewa Tesuque**, and counsel hereby certify to this Court that said allegations of **ultra vires** conduct by the defendant federal officials in **Tewa Tesuque** are clear, specific, and uncontroverted.

Under the decisions of this Court in **Philadelphia Co. v. Stimson**, 223 U.S. 605 (1912), and **Bell v. Hood**, 327 U.S. 678 (1946), federal courts have both the power and the duty to hear equitable suits against lawless federal officials. First

in the instant case, and now more recently in the Tewa **Tesuque** case, federal courts in the Tenth Circuit have arbitrarily declined to hear Indian plaintiffs whose complaints plainly establish justiciable federal questions. The Tenth Circuit's pretext for closing the courthouse doors to Indian suitors is a gross, willful misapplication of the judge-made doctrine of sovereign immunity.

We recognize that the certiori jurisidiction of this Court is discretionary, but even the Supreme Court is capable of abusing its discretion. As was long ago observed, the United State Supreme Court has no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. **Cohens v. Virginia**, 6 Wheat. 264 (1821). Just as it is the duty of all inferior courts to follow controlling decisions of the Supreme Court of the United States, **In re Howard**, 9 Wall. 175 (1869), it is the responsibility of this Court to supervise the lower federal courts to make certain that all litigants are treated fairly and with even-handed justice. **Communist Party v. Subversive Activities Control Board**, 351 U.S. 115 (1956); **Mesarosh v. United States**, 352 U.S. 1 (1956). In the past, this Court has not hesitated to restrain a lower federal court from practically nullifying a rule of law established by the Supreme Court. **La Buy v. Howes Leather Co.**, 352 U.S. 249 (1957). For this Court to continue to ignore the Tenth Circuit's perversion of the doctrine of sovereign immunity—first in the instant case, and now in the **Tewa Tesuque** decision appended hereto—is an abuse of the Court's discretion.

If this Court is truly dedicated to equal justice under the law, the Court must take action to deter the Tenth Circuit from its contemptuous dismissal of legitimate

federal claims by Indian suitors. Closing federal courtrooms to aggrieved Indians can only encourage them to resolve their disputes with federal officials by extra-legal means. When another Wounded Knee erupts from the smoldering frustration that still exists in Indian Country, we hope that this Court's indifference will not have been a contributing cause.

B. Other Substantial Grounds.

Supreme Court Rule 58(2) cites **Schriber-Schroth Co. v. Cleveland Trust Co.**, 305 U.S. 47 (1938), as exemplifying "other substantial grounds" for granting a rehearing of an order denying certiori. In **Schriber-Schroth** the Court initially refused to review the Sixth Circuit's decision because there was "no conflict of decision" between circuits. 305 U.S. at 50. On petition for rehearing, the Court was persuaded to grant review by a showing that "litigation elsewhere with a resulting conflict of decision was improbable because of the concentration of the automobile industry in the sixth circuit." **Ibid.**

The **Schriber-Schroth** rationale is directly applicable to the instant case. Although we had been inclined to view the Tenth Circuit's decision below as merely an unfortunate anomaly in the law of sovereign immunity, the subsequent repetition of the identical ruling by the Tenth Circuit in the **Tewa Tesuque** case displays a continuing and deliberate policy of refusing to hear the merits of Indian suits which present justiciable federal questions under **Philadelphia Co. v. Stimson**, 223 U.S. 605 (1912), and **Bell v. Hood**, 327 U.S. 678 (1946). We know of no other circuit which has displayed, or is likely in the future to display, such infidelity to controlling decisions of this Court. Thus, as in

Schriber-Schroth, it is improbable that there will ever be "litigation elsewhere with a resulting conflict of decision" between circuits, concerning the sovereign immunity question now before this Court.

It is well settled that a court decree can itself constitute a violation of due process which this Court will review and remedy. **Fayerweather v. Ritch**, 195 U.S. 276 (1904). **Accord: United Mine Workers v. Illinois Bar Ass'n**, 389 U.S. 217 (1967).

In **Fayerweather**, the plaintiffs contended that they had been denied procedural due process where the lower courts had reached an adverse legal conclusion without finding a vital fact upon which the conclusion was based. Although the Court ultimately decided the case adversely to the plaintiffs on the merits, the Court first held that jurisdiction was established by plaintiffs' claim of denial of procedural due process by the federal Circuit Court:

> "If a judgment of a state court can be reviewed by this court on error upon the ground that, although the forms of law were observed, it necessarily operated to wrongfully deprive a party of his property...a judgment of the Circuit Court of the United States, claimed to give such unwarranted effect to a decision of a state court as to accomplish the same result, may also be considered as presenting the question how far it can be sustained in the view of the prohibitory language of the Fifth Amendment, and thus involve the application of the Constitution. **It is said...that the necessary result of the proceedings in the state courts was a deprivation of the right of the plaintiffs** to a share of the estate, **without any finding of the vital fact which alone could destroy their right. The contention is not that the state courts erred in their finding in respect to**

> **this fact, but that there never was any finding.** Such decision of the state courts, made without any finding of the fundamental fact, was accepted in the Circuit Court of the United States as a conclusive determination of the fact. Although these plaintiffs were parties to the proceedings in the state courts and presented their claim of right, if it be true that the necessary result of the course of procedure in those courts was a denial of their rights—a taking away and depriving them of their property without any judicial determination of the fact upon which alone such deprivation could be justified—a case is presented coming directly within the decision in 166 U.S. **supra.** Giving effect in the Circuit Court to the state judgment does not change the character of the question. It is simply adding the force of a new determination to one wrongfully obtained, and adding it upon no new facts. Whether the contention of the plaintiffs in respect to the character of the state proceedings can be sustained or not is a question upon the merits and does not detemine the matter of jurisdiction.... We are of opinion that the jurisdiction of this court must be sustained."

Fayerweather v. Ritch, 195 U.S. 276, 298-99 (1904). (Emphasis added.)

In the instant case, plaintiffs have similarly been denied their right to have a legitimate federal claim heard in a federal forum, without any finding of the vital fact which alone could destroy their right— a finding that plaintiffs have not alleged that defendant federal officials have acted beyond or contrary to their statutory authority or in an unconstitutional manner. Of course the courts below did not and could not make such a finding, for the reason that plaintiffs herein have made uncontroverted

allegations that defendants have acted beyond and contrary to their statutory authority and in an unconstitutional manner. Under **Fayerweather**, then, it is clear that plaintiffs have been deprived of a federally protected right without due process of law. And **Fayerweather** makes it equally clear that this Court has the power to redress such a violation of due process by the federal courts below.

Not only does this Court have the power to redress deprivations of procedural due process by inferior courts, but it has the duty to do so:

> "But the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted federal rights has any support in the record; for if not, it is our duty to review and correct the error... (Citations omitted.)
>
> "Since the case proceeded to judgment upon the pleadings, it is elementary that every uncontradicted allegation of fact by the unsuccessful party must be taken as true. This applies to the denial by defendant that either it or the first New York company accepted the ordinance, the averment that the latter company declined to accept it... and other averments bearing upon the question of acceptance in fact.
>
> "There remains only the adjudication in the former suit against the first New York company... which the Court of Appeals regarded as concluding defendant upon matters of fact as well as law. But there is nothing in the record to make this judgment conclusive as against the defendant...
>
> "It follows that in this case **res judicata** cannot be regarded as an adequate support for the judgment...

"Judgment reversed, and the cause remanded for further proceedings not inconsistent with this opinion."

Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 473-76 (1918).

In the last analysis, of course, the Court has the discretion to grant or withhold review. As Mr. Justice Holmes somewhat cynically put it, the law is what the Supreme Court says it is. Yet we cling to the basic belief that the Court listens to other counsels of judicial self-restraint and integrity:

> "Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case 'due process of law' required an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, see **Hudson County Water Co. v. McCarter**, 209 U.S. 349, 355, on a judgment not **ad hoc** and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.
>
> "Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience...."

Rochin v. California, 342 U.S. 165, 172 (1952).

After the Koerner Commission's conclusion that ours is a racist society, perhaps we should not be surprised that a federal Court of Appeals would deliberately ignore uncontroverted allegations which entitle Indian suitors to have their cases heard in a federal forum—or that the highest court in our land would tacitly approve such judicial malfeasance by declining to review it. Nevertheless, we remain sufficiently dedicated to the concept of equal justice under law, to view the actions of the federal courts in this case as "conduct that shocks the conscience." If Mr. Justice Frankfurter were still on the Court, we think he would concur.

CONCLUSION

Petitioners have demonstrated their entitlement to a rehearing under the terms of Rule 58(2) and relevant decisions of this Court. After three years of futile attempts to get the federal courts to hear the merits of a complaint which it is their sworn duty to hear, we think that Petitioners are entitled not only to a rehearing but an apology as well.

Respectfully submitted,

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Attorneys for Petitioners

Certificate of Counsel

Undersigned counsel of record for Petitioners hereby certifies that the foregoing Petition is presented in good faith and not for delay, and that said Petition is restricted to the grounds specified in Rule 58(2)

Raymond Ickes

APPENDICES

Appendix A— Related Opinion of the Tenth Circuit in **Tewa Tesuque v. Morton**, Rendered After Denial of Certiorari in Instant Case.

APPENDIX A
United States Court of Appeals
Tenth Circuit
No. 73-1817

THE TEWA TESUQUE, an unincorporated association, JOE D. PINO, MARCUS VIGIL, EVA MITCHELL, LORENCITA PINO, JOHN MORA, JOHN VIGIL, SUSIE DORAME, IGNACIA DURAN, BEA REYNOLDS, SHIRLEY DURAN, JOE A. DURAN, ELOY HERRERA, CARMELITA HERRERA, VIVIAN HERRERA, PRISCILLA VIGIL, GILBERT VIGIL, VICKI VIGIL, MARGARET VIGIL, BOB MOQUINO, MARY MOQUNIO, MILLER E. VIGIL, ANASTACIA PINO, EUSEVIA PADILLA, MARIA C. HERRERA, VASELLIO HERRERA, BERTHA VIGIL, REYES DURN, STELLA DURAN, MARZELLA LEAF, MILTON HERRERA, MARSHA LEAF, CINDY HERRERA, GARY MOQUINO, CONNIE MOQUINO, ELMER VIGIL, LORRAINE VIGIL, DONNA HERRERA, CLIFFORD MOQUINO, YVONNE C. VIGIL, CORWIN VIGIL, DONNA MITCHELL, ARNOLD MITCHELL, JAMES F. DURAN, A. ADAM DURAN, RANDY MOQUINO, DENISE L. DORAME, VIRGIE DURAN, CECILIA ENOS, LEONARD ENOS, MARK MITCHELL,

Plaintiffs-Appellants,

vs.

ROGERS C.B. MORTON, individually and as Secretary of the Interior of the United States; LOUIS R. BRUCE, individually and as the Commissioner of the Bureau of the Indian Affairs; WALTER O. OLSON, individually and as the Albuquerque Area Director to the Bureau of Indian Affairs; ROBERT FRIEDMAN, individually and as

Superintendant of the Northern Pueblos Agency of the Bureau of Indian Affairs; JOSEPH KINGSOLVER, individually and as the Bureau of Indian Affairs coordinator for the Tesuque Pueblo or Tribe of Indians, and the SANGRE DE CRISTO DEVELOPMENT COMPANY, INC.

Defendants-Appellees.

Thomas E. Luebben, Jr., Native American Legal Defense & Education Fund, Inc., Albuquerque, New Mexico (Richard L. Young, Native American Legal Defense & Education Fund, Inc., Albuquerque, New Mexico, on the brief) for Appelants.

Edward J. Shawaker, Department of Justice, Washington, D.C. (Wallace H. Johnson, Assistant Attorney General, Albuquerque, New Mexico; Victor R. Ortega, United States Attorney, Albuquerque, new Mexico; Jacques B. Gelin, Department of Justice, Washington, D.C., on the brief) for Federal Appellee.

Dick A. Blenden, Carlsbad, New Mexico, for Sangre de Cristo Development Co., Inc., Appellee.

Before LEWIS, McWILLIAMS and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

This is an appeal from dismissal of a class action brought by members of the Tewa Tesuque (Tewa) of the Pueblo of Tesuque (Pueblo), an Indian tribe, seeking damages and equitable relief against federal officials and for cancellation of a 99-year lease between the Pueblo and Sangre de Cristo Development Company (Sangre).

The Tewas' complaint alleged seven causes of action:

(1) breach of trust by federal officials in negotiating and approving the lease; (2) violation of the NEPA by failure to prepare an Environmental Impact Statement; (3) violation of 25 U.S.C.A. § 415 by federal officials; (4) illegality of the lease under other federal statues and regulations; (5) violation of Tewas' civil rights under 42 U.S.C.A. §§ 1985 and 1988 and under the First and Fifth Amendments to the Constitution of the United States; (6) fraud by appellees in the negotiations for the lease; and (7) creation and maintenance of a public nuisance. The District Court dismissed the complaint for failure to join the Pueblo as an indispensable party and because of the sovereign immunity of the United States.

The appellants include 50 members of the Pueblo, each of whom are members of the Tewa, an unincorporated association of members of the Pueblo who are opposed to the 99-year lease granted to Sangre. Sangre, as lessee, entered into the 99-year lease with the Pueblo, as lessor, on April 17, 1970. By its terms Sangre obtained a lease on a 1,300 acre tract, Tract I, together with lease options on four other tracts consisting of 5,400 acres. Sangre intends to develop the land for residential, recreational and commercial purposes, resulting in a city of non-Indians with a projected population of about 17,000. The subdivision is laid out and designed around an 18-hole golf course. The lease was approved by the Secretary of the Interior on May 24, 1970, pursuant to 25 U.S.C.A. § 415(a) which grants wide discretion. The pueblo is to receive a maximum rental of $20 per acre per year for the leased lands, effective in 1994. For the first twelve years of the lease, the Pueblo will receive $2.50 per acre.

The Tewa contend that the Pueblo is not an indispensable party to the action and that the doctrine of sovereign immunity does not bar this action against federal officials.

I.

The Tewas' contention that the Pueblo is not an indispensable party is erroneous. An indispensable party is one whose interest will be affected by the judgment. As lessor of the lease agreement entered into with Sangre, the Pueblo will certainly be affected if the lease is cancelled. Therefore, it is an indispensable party. Further, the Pueblo may not be joined without its consent or the consent of Congress in light of its quasi-sovereign status.

Rule 19(b), Federal Rules of Civil Procedure, 28 U.S.C.A., prescribes four factors which must be considered in determining whether the trial court should dismiss for non-joinder of an indispendable party:

> .... first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In considering the first factor, we conclude that the Pueblo would be prejudiced by a judgment in its absence. If the lease is cancelled it would lose its rental income to be derived therefrom, together with employment opportunities for its members. With reference to the second factor, we hold that the above recited prejudice cannot be lessened if the lease is cancelled. Relating to the third factor, we hold that the judgment sought herein would not be adquate in the Pueblo's absence because it may very likely invite additional lawsuits. Under the last factor, we hold that the Tewa has an adequate remedy available, i.e., bringing the dispute before the tribal council of the Pueblo for

determination. This, we believe, is very critical in light of our well-established policy-rule that courts will not interfere with the internal workings of Indian tribes. Motah v. United States, 402 F.2d 1 (10th Cir. 1968); Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, 321 F.2d 767 (10th Cir. 1963). An internal dispute such as this should be decided by the tribal council of the Pueblo and not by the courts.

The Tewa contend that the issue of indispensability of the Pueblo has been decided in Norvell v. Sangre de Cristo Development Company, Inc., Civil No. 9106, F. Supp. (D. N.M. 1974), and Davis v. Morton, 469 F2d 593 (10th Cir. 1972). No final decision has been rendered in **Norvell** and, in any event, the case does not have the immediate effect of depriving the Pueblo of valuable rights under a contract. The **Davis** case held, under the same 99-year lease, that approvals of the lease would be enjoined until an environmental impact statement had been filed. The Court also held that approval of leases on federal lands constitutes major federal action. The suit did not, however, result in cancellation of the lease. **Davis** did not involve the issue of indispensability of the Pueblo.

Any prayer for relief insofar as it relates to the allegations set forth in the second and third causes of action in the complaint, i.e., violation of NEPA by failure to prepare an Environmental Impact Statement and violation of 25 U.S.C.A. § 415 by federal officials, has been rendered moot by our decision in **Davis**. The Court did not err in dismissing the action for failure to join the Pueblo as an indispensable party.

II.

In seeking injunctive relief and damages the Tewa contend that the doctrine of sovereign immunity does not bar this action against the designated federal officials because they acted beyond the scope of their authority in approving the lease.

We hold that this suit against the named federal officials is in reality an unconsented suit against the United States barred by the doctrine of sovereign immunity. National Indian Youth Council, Intermountain Indian School Chapter v. Bruce, 485 F.2d 97 (10th Cir. 1973), appeal pending; McQueary v. Laird, 449 F.2d 608 (10th Cir. 1971). While it is well-settled that government officials may not rely on the defense of sovereign immunity when they act either beyond the scope of their statutory authority or unconstitutionally, we hold that the District Court did not err in holding that the discretionary acts of the appellees exercised in the case at bar are within the outer perimeter of their authority and that they are, accordingly immune from suit. The Tewas' claim for injunctive and damage relief was properly denied.

The Tewa contend that the Administrative Procedure Act applies and that sovereign immunity is not available as a defense where relief is sought thereunder. 5 U.S.C.A. § 701-706. It is fundamental that a party suing under the APA must have suffered a legal wrong because of agency action or inaction. The Tewa have not demonstrated that they are suffering a legal wrong in view of the fact that the Pueblo through its tribal council could have voluntarily filed suit had it determined that the lease should be cancelled. The APA does not provide a basis for review of governmental decisions where the doctrine of sovereign immunity bars suit. Rockbridge v. Lincoln, 449, F.2d 567 (9th Cir. 1971)

AFFIRMED.